Ch'ng Kheng Phong v Chung Keng Huat & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–174 OF 2000
CHEW SOO HO JC
26 AUGUST 2010

Civil Procedure — Pleadings — Facts not pleaded — Existence of second will — Whether second will a forgery — Whether facts on circumstances leading to finding of second will pleaded — Whether evidence on circumstances leading to finding of second will ought to be rejected

Evidence — Expert evidence — Handwriting — Conflicting opinions of opposing handwriting experts — Whether expertise established — Whether qualified, experienced and having had testified in court — Role of handwriting expert purely to assist court — Court to finally determine question or issue at hand — Whether opinion well founded or supported with sufficient evidence

Succession — Probate — Validity of will — Existence of second will — Validity of first will established — Second will surfacing after 100 days prayer of death of deceased — Whether second will a forgery — Burden of proof on propounder — Whether there was evidence regarding circumstances leading to finding of second will — Suspicious circumstances in relation to preparation of second will — Failure to state identity card numbers of deceased, executors and trustees — Whether second will duly witnessed

Chung Beng Eng, the deceased, died on 28 August 1999. The plaintiff, the first defendant, Ch'ng Kheng Cheang, Chung Keng Leng, Chung Keng Chew and Chong Yin Cheng were the lawful children of the deceased. The second defendant was the daughter-in-law being the wife of Ch'ng Kheng Cheang while the third defendant was the grandson of the deceased being the son of Ch'ng Kheng Cheang. Dispute arose when in the existence of a will of the deceased dated 29 August 1997 ('the first will') where the plaintiff and Chung Keng Chiew were the executors and trustees, another will dated 31 October 1998 ('the second will') surfaced after the 100 days prayer of the death of the deceased. The plaintiff was informed by the first defendant on 5 December 1998 that the alleged second will was found among the photographs of their late parents. The first will was prepared by lawyer Miss Caroline Heah ('PW3') and signed by her together with her mother Pow Khoon Sim as witnesses to the signature of the deceased on the first will on 29 August 1997. Madam Pow Khoon Sim was a close friend of the deceased. The second will was allegedly

prepared by lawyer Chew Sien Chee who had passed away in March 2000, allegedly witnessed by him and Mr Koh Seong Hai ('DW2'), a cousin of the plaintiff and first defendant and the brother-in-law of Chew Sien Chee. All the three defendants are the executors and trustees of the second will. The beneficiaries in the first will and the second will were also different; in particular, the plaintiff who was bequeathed 35% of the deceased's shares in Chung Beng Eng Realty Sdn Bhd in the first will, was not devised anything in the second will except the sum of RM99.99 while the first defendant who was not bequeathed any benefit in the first will was made an executor and trustee, bequeathed a sum of RM99.99 and his children also benefited from the second will. The plaintiff contended that the second will was forged and sought a declaration that the first will was the valid last will and testament of the deceased. He also prayed that the petition for probate no 32–32 of 2000 filed by the defendants be struck out. The defendants on the other hand contended that the second will being the later will was the last will and testament of the deceased which superseded the first will. The issues agreed by both parties to be tried were: (i) whether the deceased had made the first will; and (ii) whether the deceased could have made the second will and whether the second will was a forgery. The plaintiff called PW2, a handwriting expert, whereas the defendants called DW7, also a handwriting expert. Both the handwriting experts gave conflicting views or opinions.

Held, allowing the plaintiff's claim:

(1) PW2 and DW7 were expert witnesses having satisfied the three criteria of being qualified, experienced and having testified in court before as laid down in *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247 (see para 24).

(2) The first will was prepared by PW3, duly signed by the deceased in the presence of PW3 and Madam Pow who witnessed the deceased's signature thereon. The first will was duly executed on 29 August 1997 as the last will and testament of the deceased and was a valid will (see para 44).

(3) In the defendant's statement of defence, it was pleaded that the first defendant had found the second will among some photographs. No other facts were pleaded and no evidence was led as to when and where he had found it. The first defendant was attempting to say he found the second will in Canada but this fact was not so pleaded. It is trite that any unpleaded fact ought to be rejected as trial should be confined to the pleadings (see para 46).

(4) The burden was on the defendants propounding the second will to prove it to be the valid last will and testament of the deceased. There were suspicious circumstances raised in relation to the preparation of the second will. It did not carry the identity card numbers of the deceased,

the executors and trustees. Citing the name and identity card number of the testator and executors and/or trustees is so fundamental a prudent practice and requirement that no solicitor preparing an important document such as a will would have missed or ignored to follow. Failure to include the said IC numbers in a will prepared by a lawyer, was an abnormal act. This omission gave rise to suspicious circumstances (see paras 48 & 51).

(5) The date of the second will was 31 October 1998 which fell on a Saturday. The evidence of the plaintiff and PW4 (the sole daughter in the family) showed that the deceased had not gone to Chew Sien Chee's office on 31 October 1998. PW4 was an independent and not an interested witness. This raised a doubt that deceased could have been to Chew Sien Chee's office on 31 October 1998. Further, the fact that DW2 was unable to say in what colour ink the deceased had allegedly signed his will led to the grave doubt whether DW2 had actually witnessed deceased's alleged signature. Further, based on the demeanour when he gave evidence, DW2 did not appear to be a credible and reliable witness (see paras 53 & 58).

(6) The role of an expert is to explain the technical part of the document, handwriting or signature and gives his opinion upon his analysis coupled with his reasons. It is purely to assist the court which shall determine upon the questions or issues for which the expert was called. The final determination of the question or issue is upon the court to arrive at (see para 61).

(7) The court did not prefer the opinion of DW7 as the court was not satisfied that his opinion was well founded or supported with sufficient evidence. The court preferred the evidence of PW2 who had conducted a detailed and comprehensive analysis which was well-grounded. On a balance of probabilities, the court accepted that the signature of the deceased in the second will was most probably a forgery (see para 77).

[Bahasa Malaysia summary

Chung Beng Eng, si mati, telah meninggal dunia pada 28 Ogos 1999. Plaintif, defendan pertama, Ch'ng Kheng Cheang, Chung Keng Leng, Chung Keng Chew dan Chong Yin Cheng adalah anak-anak sah si mati. Defendan kedua adalah menantu perempuan iaitu isteri Ch'ng Kheng Cheang manakala defendan ketiga adalah cucu lelaki si mati iaitu anak Ch'ng Kheng Cheang. Pertikaian timbul apabila dengan kewujudan wasiat si mati bertarikh 29 Ogos 1997 ('wasiat pertama') di mana plaintif dan Ch'ng Kheng Chiew adalah wasi-wasi dan pemegang-pemegang amanah, satu lagi wasiat bertarikh 31 Oktober 1998 ('wasiat kedua') timbul selepas 100 hari menghormati kematian si mati. Plaintif telah dimaklumkan oleh defendan pertama pada 5 Disember 1998 bahawa wasiat kedua yang dikatakan itu ditemui antara gambar-gambar

A foto mendiang ibu bapa mereka. Wasiat pertama itu telah disediakan oleh peguam Cik Caroline Heah ('PW3') dan telah ditandatangani olehnya bersama dengan ibunya Pow Khoon Sim sebagai saksi kepada tandatangan si mati pada wasiat pertama itu pada 29 Ogos 1997. Puan Pow Khoon Sim merupakan kawan rapat si mati. Wasiat kedua itu dikatakan telah disediakan B oleh peguam Chew Sien Chee yang telah meninggal dunia pada bulan Mac 2000, dikatakan telah disaksikan olehnya dan Encik Koh Seong Hai (DW2), sepupu plaintif dan defendan pertama dan abang ipar Chew Sien Chee. Ketiga-tiga defendan merupakan wasi-wasi dan pemegang-pemegang amanah wasiat kedua. Benefisiari-benefisiari dalam wasiat pertama dan wasiat kedua C juga berbeza, terutamanya plaintif yang telah diwasiatkan 35% daripada saham si mati dalam Chung Beng Eng Realty Sdn Bhd dalam wasiat pertama, tidak diwasiatkan apa-apa dalam wasiat kedua kecuali sejumlah RM99.99 manakala defendan pertama yang tidak diwasiatkan apa-apa manfaat dalam wasiat pertama telah dijadikan wasi dan pemegang amanah, diwasiatkan sejumlah D RM99.99 dan anak-anaknya juga mendapat manfaat daripada wasiat kedua itu. Plaintif berhujah bahawa wasiat kedua itu telah dipalsukan dan memohon deklarasi bahawa wasiat pertama adalah wasiat dan amanat terakhir si mati yang sah. Dia juga memohon agar petisyen untuk probet No 32-32 tahun 2000 yang difailkan oleh defendan-defendan dibatalkan. Defendan-defendan E sebaliknya berhujah bahawa wasiat kedua yang merupakan wasiat terkemudian adalah wasiat dan amanat terakhir si mati yang membatalkan wasiat pertama. Isu-isu yang dipersetujui untuk dibicarakan oleh kedua-dua pihak adalah: (i) sama ada si mati telah membuat wasiat pertama itu; dan (ii) sama ada si mati mungkin telah membuat wasiat kedua itu dan sama ada wasiat kedua itu palsu. F Plaintif telah memanggil PW2, pakar tulisan tangan, manakala defendan-defendan telah memanggil DW7, juga pakar tulisan tangan. Kedua-dua pakar tulisan tangan memberi pandangan atau pendapat bertentangan.

G **Diputuskan**, membenarkan tuntutan plaintif:

(1) PW2 dan PW7 adalah saksi-saksi pakar setelah memenuhi tiga kriteria kelayakan, berpengalaman dan telah memberi keterangan di mahkamah sebelum ini seperti yang diputuskan dalam kes *Wong Chop Saow v Public* H *Prosecutor* [1965] 1 MLJ 247 (lihat perenggan 24).

(2) Wasiat pertama telah disediakan oleh PW3, telah ditandatangani oleh si mati dengan kehadiran PW3 dan Puan Pow yang menjadi saksi tandatangan si mati. Wasiat pertama itu telah disempurnakan pada 29 Ogos 1997 sebagai wasiat dan amanat terakhir si mati dan adalah wasiat I yang sah (lihat perenggan 44).

(3) Dalam penyataan pembelaan defendan, ia telah diplidkan bahawa defendan pertama telah jumpa wasiat kedua antara beberapa gambar-gambar foto. Tiada fakta lain diplidkan dan tiada keterangan

tentang bila dan di mana dia menjumpainya. Defendan pertama cuba menyatakan dia menjumpai wasiat kedua itu di Kanada tetapi fakta ini tidak diplidkan. Adalah undang-undang tetap bahawa apa-apa fakta yang tidak diplidkan patut ditolak kerana perbicaraan patut terbatas kepada pliding-pliding (lihat perenggan 46).

(4) Beban terletak atas defendan-defendan yang mengemukakan wasiat kedua untuk membuktikan ianya wasiat dan amant terakhir si mati. Wujud keadaan-keadaan mencurigakan yang ditimbulkan berkaitan persediaan wasiat kedua. Ia tidak mempunyai nombor-nombor kad pengenalan si mati, wasi-wasi dan pemegang-pemegang amanah. Penyataan nama dan nombor-nombor kad pengenalan pewasiat dan wasi-wasi dan/atau pemegang-pemegang amanah adalah amalan dan keperluan penting yang mana seorang peguam itu tidak akan tertinggal atau lalai untuk melaksanakannya apabila menyediakan dokumen sepenting wasiat ini. Kegagalan menyatakan nombor-nombor kad pengenalan dalam wasiat yang disediakan oleh peguam adalah satu perbuatan yang luar biasa. Peninggalan ini menimbulkan keadaan yang mencurigakan (lihat perenggan 48 & 51).

(5) Tarikh wasiat kedua adalah 31 Oktober 1998 yang jatuh pada hari Sabtu. Keterangan plaintif dan PW4 (satu-satunya anak perempuan dalam keluarga itu) menunjukkan bahawa si mati tidak pergi ke pejabat Chew Sien Chee pada 31 Oktober 1998. PW4 merupakan saksi berasingan dan bukan saksi berkepentingan. Ini menimbulkan keraguan bahawa si mati mungkin telah ke pejabat Chew Sien Chee pada 31 Oktober 1998. Selanjutnya, fakta bahawa DW2 tidak dapat menyatakan warna dakwat pen yang dikatakan digunakan oleh si mati untuk menandatangani wasiatnya membawa kepada keraguan sama ada DW2 sebenarnya telah menjadi saksi tandatangan si mati yang dikatakan itu. Selanjutnya, berdasarkan perlaku semasa dia memberi keterangan, DW2 tidak kelihatan seperti saksi yang boleh dipercayai (lihat perenggan 53 & 58).

(6) Peranan pakar adalah untuk menjelaskan bahagian teknikal dokumen, tulisan tangan atau tandatangan dan memberikan pendapatnya berdasarkan analisisnya beserta sebab-sebabnya. Ia semata-mata untuk membantu mahkamah yang akan menentukan berdasarkan persoalan-persoalan atau isu-isu yang mana pakar itu telah dipanggil. Penentuan muktamad persoalan atau isu itu adalah untuk diputuskan mahkamah (lihat perenggan 61).

(7) Mahkamah tidak memilih pendapat DW7 kerana mahkamah tidak berpuas hati bahawa pendapatnya berasas atau disokong keterangan yang mencukupi. Mahkamah memilih keterangan PW2 yang telah melakukan analisis yang terperinci dan komprehensif yang berasas. Atas

imbangan kebarangkalian, mahkamah menerima bahawa tandatangan si mati dalam wasiat kedua besar kemungkinan suatu pemalsuan (lihat perenggan 77).]

Notes

For cases on facts not pleaded, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6017–6025.

For cases on handwriting, see 7(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 1592–1601.

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed 2008 Reissue) paras 2438–2446.

Cases referred to

Chin Sen Wah v PP [1958] MLJ 154 (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Karthiyayani & Anor v Lee Liong Sin & Anor [1975] 1 MLJ 119, FC (refd)

PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (refd)

PP v Muhamed bin Sulaiman [1982] 2 MLJ 320, FC (refd)

Sim Ah Song & Anor v Rex [1951] MLJ 150 (refd)

Tho Yew Pew & Anor v Chua Kooi Hean [2002] 4 CLJ 90 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31, SC (refd)

Wong Chop Saow v PP [1965] 1 MLJ 247 (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103

Karin Lim (Suppiah Arumugam with her) (Presgrave & Matthews) for the plaintiff.

Roy Rajasingham (Prema Joseph Vetharaj with him) (RR Singham) for the defendants.

Chew Soo Ho JC:

[1] Chung Beng Eng, the deceased, died on 28 August 1999 at the age of 77 years while his wife pre-deceased him in September 1998. The plaintiff, the first defendant, Ch'ng Kheng Cheang, Chung Keng Leng, Chung Keng Chew and Chong Yin Cheng are the lawful children of the deceased. The second

defendant is the daughter-in-law being the wife of Ch'ng Kheng Cheang while the third defendant, the son of Ch'ng Kheng Cheang, is the grandson of the deceased.

[2] The dispute arose when in the existence of a will of the deceased dated 29 August 1997 ('the first will') where the plaintiff and Chung Keng Chiew were the executors and trustees, another will dated 31 October 1998 ('the second will') surfaced after the 100 days prayer of the death of the deceased when the plaintiff was informed by the first defendant on 5 December 1998 that the alleged second will was found among the photographs of their late parents.

[3] The first will was prepared by lawyer Miss Caroline Heah and signed by her together with her mother Pow Khoon Sim as witnesses to the signature of the deceased on this first will on 29 August 1997 ('P2'). Madam Pow Khoon Sim was a close friend of the deceased.

[4] The second will ('D41') was allegedly prepared by lawyer Chew Sien Chee who had passed away since March 2000, allegedly witnessed by him and Mr Koh Seong Hai, a cousin of the plaintiff and first defendant and the brother-in-law of Chew Sien Chee. All the three defendants are the executors and trustees of this second will.

[5] The beneficiaries in the first will and the second will are also different; in particular, the plaintiff who was bequeathed 35% of the deceased's shares in Chung Beng Eng Realty Sdn Bhd in the first will, was not devised anything in the second will except the sum of RM99.99 while the first defendant who was not bequeathed any benefit in the first will was made an executor and trustee, bequeathed a sum of RM99.99 and his children also benefited from the second will.

[6] The plaintiff contended that the second will is forged and sought a declaration that the first will is the valid last will and testament of the deceased. He also prayed that the Petition for Probate No 32–32 of 2000 filed by the defendants be struck out or alternatively that the said petition be retained but with the second will and the defendants being substituted by the first will and the plaintiff and Chung Keng Chiew as the legal executors.

[7] The defendants on the other hand contended that the second will being the later will was the last will and testament of the deceased which supersedes the first will.

THE ISSUES

[8] The issues as agreed by both parties to be tried are contained in bundle E and can be deduced as follows:

(a) Whether the deceased had made the first will dated 29 August 1997; and

(b) Having regard to all the circumstances of the case, whether the deceased could have made the second will dated 31 October 1998 and whether the alleged signature of Chung Beng Eng, deceased in the second will is the signature of Chung Beng Eng, deceased or whether the second will dated 31 October 1998 is a forgery.

EVALUATION

The plaintiff's case

[9] Four witnesses including the plaintiff himself were called in the plaintiff's case. Their evidence are briefly as follows:

[10] The plaintiff ('PW1') testified vide his witness statement ('P1') that there are six siblings in the family inclusive of himself namely:

(a) Ch'ng Kheng Cheang, eldest brother;

(b) Chong Yin Cheng, the only sister in the family (SP4);

(c) Chung Keng Leng, the third brother in the family;

(d) Chung Keng Huat, the first defendant; and

(e) Chung Keng Chiew, the youngest brother.

[11] The plaintiff is the second brother in the family. Both their parents have passed away. His father Chung Beng Eng's death certificate was produced in p 1 of bundle B. His mother pre-deceased his father. Between 1996 until his death on 28 August 1999, Chung Beng Eng ('the deceased'), lived at house at No 7, Tingkat Binjai 20, Taman Sri Rambai, Bukit Mertajam as well as at No 67, Lebuh Binjai 2, Taman Sri Rambai, Bukit Mertajam with the plaintiff and the plaintiff's family. These two houses are about 100 metres apart. The deceased normally stayed at house No 7 during the day and at No 67 during the night. According to the plaintiff, deceased died leaving a will dated 29 August 1997, the first will (P2) which deceased had shown to the plaintiff and the plaintiff's family several times after his mother had passed away and while his sister SP4 was visiting the deceased. Upon the deceased's death on 28 August 1999, relatives and friends including a lawyer Chew Sien Chee and his brother-in-law, Koh Seong Hai attended the funeral.

[12] On 7 September 1999, the plaintiff opened the safe of the deceased and found a brown sealed envelope with the type-written words 'The Last Will & Testament of Chung Beng Eng'. He showed it to his brothers. The sealed envelope was opened; it contained the last will of the deceased. It was read and all the four brothers and the plaintiff respectively signed on the said envelope.

No one had objected or challenged the first will but agreed that the plaintiff should call Miss Caroline Heah, the lawyer who witnessed the will to read the will. The plaintiff's sister did not sign as she had no interest in the property of the deceased. The plaintiff subsequently went to see Madam Pow Khoon Sim, the mother of Caroline Heah and the second witness to the first will, to request her to contact Caroline Heah. The plaintiff said before the deceased passed away, he had taken the deceased to meet Madam Pow and Caroline Heah sometime in 1997. On or about 9 September 1999, Caroline Heah came to Bukit Mertajam and met the plaintiff and Chung Keng Huat, the first defendant, who was representing also the other the brothers who could not attend, in a coffee shop. The plaintiff handed the envelope with the five signatures of the brothers to Caroline Heah who took out a copy of the first will in her possession. She showed both copies and compared them in their presence. The contents of the will were the same. She then read the contents. The plaintiff and the first defendant agreed that the first will was the last will of the deceased. The first defendant then said he represented the other three brothers and agreed that Caroline Heah could apply for probate for which plaintiff also agreed. The plaintiff and his youngest brother Chung Keng Chiew were named as executors and trustees in this first will. Miss Caroline Heah did proceed to apply for the grant of probate but amidst that, Chung Keng Chiew had appointed Messrs Chew Sien Chee & Co, advocates & solicitors and had queried Caroline Heah's capacity as solicitors for Chung Keng Chiew alleging that he had never appointed Caroline Heah to act for him.

[13] On 5 December 1999 at the 100 days prayer for the deceased at the plaintiff's house, the first defendant threw a disc to the plaintiff saying that he had found another will of the deceased in between photographs of their parents. The plaintiff was asked to read the disc. This alleged will was prepared by Messrs Chew Sien Chee & Co. However, during his father's funeral when Chew Sien Chee and Koh Seong Hai attended, they had never mentioned about this alleged second will. Chew Sien Chee had passed away on 3 March 2000. The plaintiff later learnt from Messrs KJ Soo & Associates, advocates and solicitors that Messrs Chew Sien Chee & Co acting for the three defendants had applied for the grant of probate of this second will dated 31 October 1998. The plaintiff said that this was done behind his back and he immediately instructed his solicitors Mr KJ Soo to file a caveat to prevent the extraction of the probate and to file this action for the deceased's first will dated 29 August 1997 to be admitted to probate.

[14] The plaintiff asserted that the deceased could not have made the second will citing the following suspicious surrounding circumstances of the making of the second will:

(a) The deceased had been showing the plaintiff and the plaintiff's family several times of the first will when the plaintiff's sister was on her visits to the deceased after his mother's death. The deceased would not have done so if he had made another will.

(b) The deceased could not have gone out of the house on 31 October 1998 without the plaintiff's knowledge because he always asked the plaintiff to drive him to the places he wanted to go or visit but the deceased had never instructed the plaintiff to take him anywhere that day.

(c) 31 October 1998 was a Saturday. The plaintiff's sister SP4 used to visit the deceased every weekend from Friday to Sunday. The deceased could not have gone out when SP4 was with them on Saturday.

(d) The deceased never liked Chung Keng Leng and the first defendant and there is no way he could have left a portion of his estate to them or their children.

(e) Koh Seong Hai is the plaintiff's cousin and Chew Sien Chee was the husband of Koh Seong Hai's sister. Both of them attended the deceased's funeral but had never mentioned that they were the witnesses to the second will.

(f) The second will does not contain the IC number of the deceased and the executors. The deceased could not read or write in English but the full names including the Christian names of the grandchildren are stated in the second will whereas in relation to the first will, the deceased knew the names of the beneficiaries as he had personally instructed the lawyer to prepare it. In the second will, the grandchildren have not been listed according to the family order. There is also no reason why the deceased would give so little to the plaintiff's children as compared to the children of Ch'ng Kheng Cheang, Chung Keng Leng and the first defendant. The deceased did not have good opinion on the first defendant who lived in Canada and could not have entrusted funds to the first defendant for a foundation. Referring to para 7 in the second will which states that should any descendants take a second wife while the first is alive, they, their wives and children would not benefit in anyway under the second will and would be disqualified as future trustees of the foundation, the plaintiff contended that this does not make sense because on 9 November 1998, the deceased had made the plaintiff's second wife a director of Chung Beng Eng Realty Sdn Bhd. If the deceased had made the second will in October 1998, he would not have done so.

(g) The name Chew Sien Chee was handwritten and not typed while Chew Sien See as lawyer would have normally signed as the first witness followed by the second witness but it was the reverse. The deceased could not have obtained the services of Chew Sien Chee to prepare his will as he was not satisfied with the service of Chew Sien Chee in a case he appointed Chew Sien Chee to act.

(h) The signature of the deceased was signed in blue ballpoint which is quite abnormal for an important document prepared by a lawyer and signed in his presence.

(i) The deceased also did not remove the plaintiff who has a second wife as a director of Chung Beng Eng Realty Sdn Bhd until his death. The plaintiff's second wife and the plaintiff are still the directors of that company.

(j) The plaintiff suspects that the second will had been prepared in advance by the first defendant and Chung Keng Leng and that they have caused the deceased's signature to be forged.

[15] On the relationship between the deceased and the children, the plaintiff said it was good except for Chung Keng Leng and the first defendant. The deceased disliked Chung Keng Leng because the latter had taken away the deceased's whole business in Hong Kee Plastic Industry Sdn Bhd. In support of this, the plaintiff referred to several letters written in Chinese by the deceased with translation annexed as shown in bundle D pp 19–31. As regards the first defendant, the deceased felt upset and disappointed with him because the first defendant had, while the deceased and his wife (the plaintiff's mother) who was ill at that time were in Canada with the first defendant, asked the deceased to send their mother to an old folks' home or to 'put her to rest' so that the deceased could spend the rest of his life going around places which he liked. Since then the deceased had completely cut off the first defendant. Before their mother's death, upon persuasion of the sister PW4 and the plaintiff's family, only then the deceased allowed the first defendant to visit them. After the mother's death, the first defendant had invited the deceased to live with him in Canada but the deceased knew and allegedly told the plaintiff that the first defendant's motive in inviting him to live in Canada was to grab all his properties after his death. The plaintiff added that his parents initially stayed with Chung Keng Leng but when the deceased learnt of the true colour of Chung Keng Leng, the deceased came over to Bukit Mertajam and lived with the plaintiff and his family. The plaintiff said he took good care of his parents who had suffered from stroke and they were close to him. The deceased knew that he could trust the plaintiff to take care of the plaintiff's mother and that was why when he opened the fixed deposit account, it was in joint name with the plaintiff with a survivorship clause intending to leave the fixed deposit to the plaintiff as a gift.

[16] The plaintiff therefore sought a declaration that the first will dated 29 August 1997 is the last will and testament of the deceased and that the Petition for Probate No 32–32 of 2000 in respect of the second will be struck out or substituted with the first will with the plaintiff and Chung Keng Chiew as executors.

[17] To prove the validity of the first will, the plaintiff had called Miss Caroline Heah Gaik Hong (PW3), the lawyer. She confirmed that she prepared the first will based on instruction given to her personally by the deceased in Bukit Mertajam. The deceased knew her mother, Madam Pow Khoon Sim for many years and had confidence in her. Madam Pow had informed the deceased that PW3 is a lawyer and could prepare his will. On the first occasion when PW3 came from Johor, she took instruction from the deceased. About two weeks later, she brought the will for the deceased to sign. On both occasions, the deceased was brought by his son, the plaintiff. The contents of the will was explained in Hokkien by PW3 as the deceased did not understand English. The deceased understood the contents of his will before he signed it. It was on 29 August 1997 and at that material time, only the deceased, PW3 and her mother, Madam Pow were present. Two copies of the will were prepared, PW3 and Madam Pow witnessed the deceased signing the two copies of the will and then they signed as witnesses. The original of the signed will kept in a brown envelope with the typewritten 'The Last Will & Testament of Chung Beng Eng' was given to the deceased while PW3 kept the duplicate. On 9 September 1999, PW3 came to a coffee shop in Bukit Mertajam at the request of her mother who had been informed of the death of the deceased by the plaintiff. At the coffee shop, PW3 met the plaintiff and the first defendant. The plaintiff gave PW3 a brown envelope containing signatures. The first defendant declared that he represented the other brothers apart from the plaintiff. SP3 took out the original will from inside the brown envelope and compared it with the duplicate copy kept by her in the presence of the plaintiff and the first defendant. PW3 then read the full contents of the will to those who were present. She identified P2, the first will to be the will. PW3 said she asked the plaintiff and the first defendant whether they had any objection to the last will and testament of the deceased. They agreed to the contents and had no objection. Both the plaintiff and the first defendant then agreed that PW3 could proceed to apply for the grant of probate and the first defendant had also declared that he represented Chung Keng Chiew who is the other executor of this first will. A few weeks later, PW3 received a letter from Messrs Chew Sien Chee & Co stating that Chung Keng Chiew did not appoint her to petition for the grant of probate. Prior to receiving Messrs Chew Sien Chee's letter, SP3 had on 21 September 1999 written to ACF Finance Bhd to freeze the related joint accounts of the deceased out of prudence and abundance of caution. However, she realised subsequently that there was a survivorship clause in respect of the fixed deposit joint account of the deceased. Referring to the letter from Messrs Chew Sien Chee & Co to her reneging her appointment to act for Chung Keng Chiew, dated 18 December 1999 ('D25'), PW3 stated that there was no mention of the second will nor was she informed not to proceed with the petition for probate since the second will had existed. Messrs Chew Sien Chee & Co also did not state that they were acting for the executors of the second will but that they were acting for Chung Keng Chiew. Chung Keng Chiew had written a complaint to the Bar Council against SP3 for acting without his

instruction for which PW3 had duly replied vide her letters dated 5 June 2000 and 16 August 2000 (bundle C pp 74–79 and 80–81) respectively. The complaint was subsequently dismissed.

[18] PW4 Chong Yin Cheng is the youngest sister of the plaintiff. Basically she testified that her relationship with the deceased was very good and close as she was the only daughter in the family. The plaintiff and his family had also good relationship with the deceased. Between 1996 until the deceased's death on 28 August 1999, the plaintiff and his family took good care of their parents who suffered from stroke. The parents' funeral were also held in the plaintiff's house. However, PW4 stated that the relationship between the deceased and Chung Keng Leng was very bad as was clearly shown vide the letters written by the deceased as exhibited in bundle D pp 19–31. The deceased had also confided in PW4 many things which he had stated in his same letters.

[19] As to the relationship between the deceased and the first defendant, PW4 narrated the incident which hurt the deceased ie the deceased had once accompanied their mother to Canada for further treatment of her stroke, the first defendant was then working and living in Canada; when the deceased was in Canada, all of a sudden he called PW4 to go to Canada to bring him and her mother back to Malaysia. PW4 then went to Canada and made arrangements for the parents to fly back to Malaysia. The deceased told PW4 that the first defendant had told the deceased to send their mother to an old folks home or to 'put her to rest'. The deceased was very upset, sad and furious with such a statement from his own son whom he had educated to a very high level of PhD.

[20] As to the other two brothers Ch'ng Kheng Cheang and Chung Keng Chiew, their relationship with the deceased was good. After the death of their mother, the deceased was very lonely and sad; he had had knee-joint problem. PW4 advised him not to drive and asked the plaintiff to drive the deceased wherever he wanted to go. PW4 who was working in Kuala Lumpur with her husband in their own engineering consultancy firm, visited the deceased every weekends from Friday nights to Sunday evenings as she was close to the deceased. At that time, the deceased was staying with the plaintiff and his family. As to whether the deceased had left any will, PW4 said that after her mother's death, the deceased had shown his will to the plaintiff, the plaintiff's family and to her several times when PW4 was on her visits to him.

[21] PW4 contended that her parents had given her education up to bachelor of engineering (electrical) degree. Being the only daughter, her parents confided in her in many things. In order to visit the deceased on weekends, PW4 had to turn down some engineering projects. During weekdays, she also made a lot of telephone calls to talk to the deceased.

[22] When the parents were staying with the plaintiff and his family, they were well taken care of, put on weight and were healthier. During a New Zealand trip in February 1999 with the deceased, the deceased had confided with PW4 certain confidential matters relating to his last will prepared by Caroline Heah. The deceased mentioned that he set up various businesses and later with the help of Ch'ng Kheng Cheang and the plaintiff, he was able to accomplish many things within the family. The family business thrived and the deceased was able to educate PW4 up to bachelor of engineering degree and PW4 was able to earn a good income, to help Chung Keng Leng to start a business with capital from family business and Chung Keng Leng was on firm ground but had caused a lot of heartache to the deceased, to educate the first defendant up to PhD in chemical engineering and had bought him a new bungalow in Edmonton, Canada but had excessive heartache over the first defendant's suggestion to put their mother to nursing home or 'put to rest' and lastly, was able to educate Chung Keng Chiew up to bachelor of engineering (chemical) degree. The deceased expressed that he need not worry about the four younger children but she should take care of his two elder sons. PW4 advised the deceased that he came from China in the 40s empty handed and he was free to decide what he wanted to do with his wealth.

[23] In relation to the second will, PW4 gave her view that the deceased would not have made that. She gave the reasons that her name should not have appeared in any of her father's will as this had been mutually agreed between her parents and herself and SP4 had in 1996 returned the double storey link house in Bukit Mertajam, bought by the deceased and put in her name, to the deceased who accepted it and immediately transferred the house into the plaintiff's name. The deceased had kept reminding SP4 in confidence that he had appointed the plaintiff and Chung Keng Chiew as the executors in his last will prepared by Caroline Heah. If the second will was deceased's last will, the deceased would not have appointed the plaintiff and his second wife as the directors of Chung Beng Eng Realty Sdn Bhd.

[24] Since the plaintiff disputed the second will and pleaded that the signature of the deceased on the second will was forged, PW2, Siow Kwen Sia, a forensic document analyst or more commonly known as handwriting expert was called. His evidence in chief was vide his witness statement marked P21. PW2 gave his academic qualification to be a bachelor (honours) degree in chemistry in 1973 from the University of Malaya, a post graduate diploma in forensic science, from University of Strathclyde, United Kingdom in 1984, an associate member of the Institut Kimia Malaysia and a member of the Forensic Science Society, United Kingdom from 1984–1998. PW2 has 13 years working experience as a forensic chemist in the Chemistry Department Malaysia. In 1991, he started his own consultancy firm dealing solely with forensic documents analysis. He has been a document analyst verifying

signatures, handwritings etc for the past 23 years and had verified over 3,000 questioned signatures and/or handwritings. PW2 had also testified in numerous civil cases and domestic inquiries. He has testified in court before this case in 75 other cases and that his evidence has been accepted by court in most cases. Details of some the cases were given in Q & A 6 and 7 in his witness statement P21. I find PW2 to be an expert witness having satisfied the three criteria of being qualified, experienced and having testified in court before as laid down in *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247. PW2 said that upon instruction from the plaintiff to determine whether the signature of the deceased in the second will was of the same authorship as the specimen signatures provided to him, PW2 had analysed and prepared his report as exhibited in bundle C pp 42–60. 41 specimen signatures were used as shown in bundle C pp 49–59. On the methodology used by him to verify the signature, PW2 based it on world-recognised authorities on signature verification and handwriting examination in particular Ordway Hilton's book *Scientific Examination of Questioned Documents 1982, Revised 1993* from USA and Dr Wilson R Harrison's book *Suspect Documents. Their Scientific Examination, 3rd Indian Reprint 2003* from UK. The method used is visual comparison of the features of writing form and movement between the questioned signature and the specimen with the aid of Nikon SMZ1 stereoscopic microscope. The specimens are first inter-compared to establish the range of variation for a particular feature. If the corresponding feature in the questioned signature falls outside this range of variation, it is a difference. If It is within the range, it is a similarity. PW2 said he photographed the questioned signature of the original of the second will at the High Court, Penang on 28 November 2001 as exhibited in bundle C p 60 which he marked 'Q'. He visually compared the 41 specimen signatures of the deceased of their horizontals, diagonals, left turn and right turn. He searched for differences between the questioned signature 'Q' and the 41 specimen signatures. He highlighted all the variations found in the specimen signatures. After comparing the questioned signature 'Q' with the specimens, he found the features of 'Q' to be more regular, more orderly and more open than in the specimens. SP2 subsequently narrowed the comparison to the June 1998 to June 1999 specimens that he had marked as S35–S41 being contemporary to the period of the questioned signature. Comparing S35–S41 and 'Q', PW2 found the questioned signature 'Q' to be totally out of place or distinctly different from the most contemporary specimen signatures because these specimens have (1) collapsed to three levels and (2) two or more areas of merging — characteristic features that are not found in 'Q'. Based on the differences as stated in sections D and E2 of his report (bundle C pp 46 and 48), PW2 concluded that the questioned signature 'Q' in the second will is of different authorship from the specimen signatures of Chung Beng Eng, the deceased.

[25] PW2 also gave his view why he disagrees with the finding and conclusion of the defence's expert Mr Harcharan Singh Tara and he gave his

reasons for disagreeing. He focused on the only two main points of similarities on which Mr Harcharan Singh Tara had concluded the questioned signature to be of common-authorship; the first being the similarity in pictorial impression/general form and the second is that the questioned signature is fluent. PW2's comment is that when one copies a signature, one will obviously copy the general form and it is thus not a similarity in detail and copied signatures in free hand can be fluent especially where the signature has a simple structure as in this case. To support the conclusion of common authorship, PW2 added that an expert should produce a list of numerous similarities in detail on features similar to those that he had mentioned in his report and identify the specimens that best match those details. PW2 also disagrees with Harcharan Singh Tara's statement that all the differences pointed out by him are due to the speed in writing. He explained that if speed is the determining factor, then there should be minimal or no differences among the specimens in the features which he had listed out in his report but the specimens differ widely in many features. He emphasises that it is illogical to state that speed is responsible for the differences. Another aspect raised by PW2 about Harcharan Singh Tara's report is that the latter used only nine specimen signatures of which seven are not contemporary and six are found in an environment different from 'Q' ie in a highly cramped and crowded environment. Harcharan Singh Tara had also used three specimens from SP2's report ie S3, S12 and S24 to conclude that these three specimens are similar to 'Q' in general form and therefore 'Q' is of the same authorship. However, PW2 had found five to seven differences comparing 'Q' with S3, S12 and S24 for which Mr Harcharan Singh Tara had conveniently ignored to justify his pre-conceived conclusion of common authorship. On S12 which Harcharan Singh Tara concluded to have been executed in the same manner as 'Q', PW2 stated that when the signatures are placed side by side, S12 and 'Q' clearly do not match even in general form. He produced the coloured copy of the specimens in his report to substantiate his reason for saying so. PW2 held the view that 'Q' is likely to be copied from the signature of the deceased in the first will which he marked as S24 because of similar placement of upper body relative to base stroke, parallelism of strokes and lowest diagonal being the longest.

The defendant's case

[26] The defence called seven witnesses and the salient parts of their evidence are briefly as follows:

[27] The first defendant ('DW1') gave evidence vide his witness statement marked D28. Objection had been taken by learned counsel for the plaintiff on numerous questions and answers that were not facts pleaded in the defence but premised on the proposed amended statement of defence which had been

disallowed by the senior assistant registrar. After hearing arguments by both parties and having perused the statement of defence, this court has disallowed the unpleaded material facts in the following questions and answers in the first defendant's witness statement as it is trite that parties are bound by their own pleadings and must confine to their pleadings (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 SC: Q & A. 16,18–20, 24, 37 (from line three to the last part of the answer), 42–46,48–49,51 and 73.

[28] The first defendant said that in 1996, his parents lived with the plaintiff and the plaintiff's family at house No 7, Tingkat Binjai 2, Taman Sri Rambai but in June 1998, his parents moved to live at house No 67, Lebuh Binjai 2, Taman Sri Rambai which is five minutes walking distance from the plaintiff's residence. The first defendant averred that his parents moved out because of frequent disturbances and quarrels on life style and money matters between his father and the plaintiff and the plaintiff's mistress. The plaintiff would frequently harassed his father for money and if his father refused, he would be subjected to verbal and emotional abuses. On the relationship between the plaintiff and his father, the first defendant said it was not good and that after his mother's death, his father had given an ultimatum to the plaintiff and his mistress that he would not tolerate anymore abuse from them and openly denounce that the plaintiff would not inherit any of his estate as the plaintiff had been given RM500,000 cash previously. After his mother's death, the first defendant had invited his father to live with him in Canada and his father had accepted it but it was postponed because his sister SP4 would be taking his father to New Zealand for a three week vacation. On 24 March 1999, his father suffered a stroke in New Zealand. On 27 August 1999, the plaintiff called to inform the first defendant that their father was critically ill. The first defendant and his wife returned to Bukit Mertajam on 30 August 1999 and found his father had passed away on 28 August 1999.

[29] From his father's room, the first defendant said he noticed the filing cabinet to be empty and when he confronted the plaintiff, the plaintiff admitted that he had cleared up the cabinet and kept the important documents. On 7 September 1999 at about 2.30pm, all the siblings met the plaintiff and Madam Pow at Ciku Lane, Bukit Mertajam on a sidewalk. The plaintiff removed copy of the first will from an envelope and gave to them. Madam Pow then asked the siblings to sign at the back of the envelope of their receipt of a copy of the first will. On 8 September 1999, on the insistence of his aunt, the first defendant, his wife and the aunt went to Ciku Lane where the first defendant, his aunt, met the plaintiff, Madam Pow and Miss Caroline Heah, PW3 in a coffee shop. PW3 took out a document, the first will from an envelope, read and translated it in Hokkien. It was the same will, photo copy of which was given to them earlier. The first defendant said to the plaintiff and PW3 that he had no business in relation to the first will as his name was not

mentioned therein and told them to discuss with his younger brother, DW3 who was the other executor in the said will. That meeting took about 20 minutes.

[30] On 5 December 1999, the first defendant confronted the plaintiff at the plaintiff's residence for the 100th day prayer of the deceased of the existence of the second will and gave the plaintiff a compact disc containing the scanned image of the second will. The first defendant stated that the deceased had numerous fixed deposit joint accounts with the plaintiff totalling RM2m, three pieces of land and two shop lots upon his death. He also mentioned about his younger brother, DW3's complaint to the Bar Council against Caroline Heah, PW3.

[31] Several correspondences between his solicitors and Affin Bank Bhd or the solicitor for Affin Bank Bhd were referred to and the letter dated 23 October 2007 from Messrs Kamarudin & Partners, solicitors for Affin Bank Bhd (bundle C p 9) had informed that the monies in the joint account were withdrawn in full by the plaintiff as the surviving joint account holder on 31 January 2001. This was pursuant to a survivorship clause as in the terms and conditions of the joint account (bundle C p 99). The first defendant claimed that Messrs Chew Sien Chee & Co was his father's solicitors.

[32] From the second will, the first defendant said he was a beneficiary with a token sum of RM99.99. DW3 and the grandchildren would receive more from the second will. Referring to para 7 in the second will, the first defendant said the deceased stated that if any of his descendants who took a second wife while the first was still alive, their wives and children would not benefit under his will, inter alia. By para 8, the deceased had declared that the plaintiff would have no claim to his estate since the plaintiff had been given more than a million ringgit worth of monies and assets.

[33] In cross-examination, the first defendant agreed that by referring to the company search P15, the deceased had made the plaintiff's second wife a director in his company, Chung Beng Eng Realty Sdn Bhd on 10 November 1998, less than nine months before his death and hardly ten days after the date of the second will. He further agreed that by the company resolution dated 4 January 1999 (P24), the deceased had given mandate to the plaintiff and his second wife to operate the said company account with either one of their signatures. He also agreed that vide the notice of transfer of share (P23), the one share out of two in the said company belonging to his late mother had been transferred to the plaintiff sometime before his mother had passed away. This company held the bulk of the deceased's assets. However, he still disagreed that his parents had great faith and good relationship with the plaintiff.

[34] On the deceased's joint accounts with the plaintiff, the first defendant said that the deceased opened the joint accounts for convenience and plaintiff had no say on those accounts. On the survivorship clause in bundle C p 99,first defendant said he could not answer it and he was not aware of this clause but upon perusal of the letter from Messrs Heah & Co (bundle C pp 80–81), he agreed that he knew the plaintiff had the right to withdraw the money and was not disputing the fact that the bank had released the money to the plaintiff because of the survivorship clause.

[35] As regards the relationship with Chung Keng Leng, the first defendant said he was not aware that his parents had a bad relationship with Chung Keng Leng.

[36] On the second will, the first defendant said he found it in October 1999. He said Chew Sien Chee was the lawyer who witnessed it but Chew Sien Chee had not informed him about this second will nor informed his brothers of this second will. He agreed that before he and his brothers told Chew Sien Chee about the second will, Chew Sien Chee did not know the existence of the second will but said that when they told Chew Sien Chee that there existed a second will, Chew Sien Chee confirmed. The first defendant claimed that Chew Sien Chee said the deceased instructed him not to tell anyone but the first defendant did not know why Chew Sien Chee did not tell anyone even after the deceased had passed away. He agreed that the second will emerged only after all the brothers had seen the first will. Referring to Chew Sien Chee's letter dated 18 December 1999 (bundle C pp 65–66) to Messrs Heah & Co as to why a copy of the second will, if it really existed, was not sent to Messrs Heah & Co to put an end to the estate matter, the first defendant said he did not know nor did he know why Chew Sien Chee had made no reference to the second will when he wrote the said letter. The first defendant was referred and asked to compare the language used in the first will and the second will. It was then suggested and put that paras 1, 2, 3, 9 and 10 in the second will had been copied from paras 1, 2, 3, 11 and 12 in the first will as they were similar in language and substance. The first defendant answered he did not know. When it was further put to him that the signature on the second will of the testator was also copied from the signature of the deceased in the first will, the first defendant also answered that he did not know. On being shown the second will, the first defendant agreed that there is no identify card numbers of the testator, the executors and there is no identify card or identification of the beneficiaries. He had no idea whether the deceased would be able to provide all details of the grandchildren with their Christian names and full names though the deceased knew how to pronounce some of these names. He agreed that from the first will, he and his children did not get any benefit from the legacy but would benefit from the second will so is DW5 Chung Keng Leng and his children. He denied that the second will was forged. On the second attesting

witness in the second will named Koh Seong Hai, the first defendant said in Q & A 49 in his witness statement where he said that Koh Seong Hai was dead, was a typing error — when the first defendant and his brothers contacted Chew Sien Chee to confirm the second will, they had also tried very hard to look for Koh Seong Hai since October 1999 but could not find him. They managed to locate him recently after Koh Seong Hai who was in Thailand had just moved back to Malaysia. On being referred an affidavit of Koh Seong Hai sworn on 11 September 2000 at Bukit Mertajam, the first defendant said he could not confirm and deny he was lying when he said they could not trace Koh Seong Hai. He agreed that this affidavit was filed after Chew Sien Chee had passed away but did not know why it was not filed when Chew Sien Chee was alive. Chew Sien Chee was the brother-in-law of Koh Seong Hai who is the cousin of the first defendant and the plaintiff. The first defendant said he had asked Chew Sien Chee to locate Koh Seong Hai before his death but they managed to trace Koh Seong Hai only after Chew Sien Chee had passed away. On the relationship of his sister PW4 with his father, the deceased, DW1 acknowledged that PW4 had a close relationship with the deceased but added that so had everyone including DW5 although the deceased had written letters, bundle B pp 22–24, condemning DW5. As regards question on the suspicious circumstances surrounding the making of the second will which DW1 had failed to explain, DW1 replied that he could not answer the question and only his late father could. He disagreed that he could not have found the second will among the photographs of his parents upon the death of the deceased. In re-examination, he asserted he had no doubt that the second will was the last will of the deceased and that it would be the lawyer Chew Sien Chee who prepared this will and witnessed by Koh Seong Hai. He also said that his father's intention was stated in the second will. On the names of the grandchildren, he said that the deceased must have figured out their names somewhere.

[37] DW2 Koh Seong Hai said in his witness statement, D38, that he is the nephew of the deceased. In relation to the second will, he said the deceased made this second will in which he was one of the two witnesses who attested the signature of the deceased; the other witness was Chew Sien Chee, a lawyer of Messrs Chew Sien Chee & Co who had since passed away. The late Chew Sien Chee was his brother-in-law. The second will was in English but it was translated in Teochew dialect to the deceased by Chew Sien Chee. The deceased appeared to understand and signed the will in the presence of both of them in Chew Sien Chee's office/room. He confirmed the signature of the deceased in the second will at bundle B p 16. In cross-examination, DW2 said he had not signed any sworn statement on behalf of any of the defendants nor had he given any sworn statement to the defendants before. After the second will, he was affirmative that there was no other sworn statement. On being shown an affidavit P31, DW2 confirmed that he had signed this affidavit explaining that it had been too long and he could only remember when he saw the document.

On the second will, DW2 said that he only saw it on 31 October 1998 in Chew Sien Chee's office. When he arrived there, the deceased was already there and the deceased asked him (DW2) to be his witness and to sign his will. DW2 said he heard Chew Sien Chee reading the contents of the second will to the deceased. He said Chew Sien Chee took out his file, opened the file, took out the will and read to both of them. Before signing, Chew Sien Chee requested for the deceased's IC, compared the IC probably with the name and IC number of the deceased in the will. The deceased then signed the second will first followed by Chew Sien Chee and then by DW2. When DW2 signed the second will, Chew Sien Chee took DW2's IC and compared the number in the will. DW2 added that the arrangement of the signatures was that the deceased's signature was on top, Chew Sien Chee's signature was second and his signature was at the last and the manner the signatures were signed was the same. When the second will was challenged as DW2's signature was second and Chew Sien Chee was third which question was explained several times to DW2, he did not answer. DW2 stated that he could not remember in what ink or pen that he signed the second will but asserted that the deceased used a black ink pen to sign on the will. When being put that the alleged deceased's signature in the second will was in blue ink, DW2 maintained that the deceased signed in black ink. He could not remember whether after the deceased had signed the will, the deceased passed his pen to Chew Sien Chee to sign but after Chew Sien Chee had signed, he passed the pen to DW2 to sign. DW2 said two sets of the will were signed. Immediately after signing, the deceased left. The process that deceased arrived, signed and thereafter left was very fast; it took a few minutes to complete. After the deceased had left, DW2 left with Chew Sien Chee and did not know what happened to the will. Chew Sien Chee passed away in 2000; he was shot dead. DW2 said further that the deceased had told him not to tell anyone about the will. Referring to DW2's affidavit P31 where he had affirmed that the deceased took out documents from the envelopes and requested Chew Sien Chee to translate into Teochew; it was put that what DW2 had said in the affidavit was totally inconsistent with his evidence in court for which DW2 disagreed. He further disagreed that what he said in the affidavit that he saw the deceased at about 10.30am entering Chew Sien Chee's office with two envelopes in his hand was totally inconsistent with his version given in court. In re-examination, DW2 said the deceased signed his first signature on the second will using his own pen but for his second signature, the deceased signed with the pen given by Chew Sien Chee. He however changed to say he could not remember what colour of ink was the deceased's pen but for the rest of the signatures, they were in black ink. He reaffirmed that what he had stated in his affidavit is the truth and what he had testified in court is also the truth. When recalled some two months after his initial evidence to identify the original second will, DW2 said in cross-examination the signature in blue ink was signed by the deceased in his own pen but he did not mention that the deceased's pen was blue in ink. He added all the remaining five signatures

signed by the three of them were signed with another same pen. He signed and wrote with the same pen which Chew Sien Chee used to sign on the same second will.

[38] DW3, Chung Keng Chiew is the youngest son of the deceased and an executor of the first will. He said he was not aware of the first will until being shown a copy at the sidewalk of Ciku Lane, Bukit Mertajam by one Ms Pow on 7 September 1999. After the funeral ceremony of his late mother who passed away on 17 September 1998, DW3 said that the deceased had in the presence of all his siblings except Chung Keng Leng, given the plaintiff and his mistress an ultimatum that the deceased would not tolerate any more abuses from them, openly denounced the plaintiff and said that the plaintiff would not inherit any of his estate and had no right to claim as plaintiff had been given RM500,000 in cash previously. He said he did not instruct lawyer Chew Sien Chee to challenge the first will upon the discovery of the second will which is the last will and testament. The day before he was shown the first will by Ms Pow, DW3 said his sister-in-law, the second defendant had asked the plaintiff to disclose any document in his possession pertaining to the distribution of the deceased estate since all the siblings were present then. The plaintiff was evasive and only in the evening that the plaintiff told the first defendant that all siblings were to meet at his lawyer's office the next day but instead they met at Ciku Lane. As to the plaintiff's relationship with the deceased, DW3 said they were no good as there were frequent quarrels and disturbances relating to monies. In cross-examination, DW3 agreed that from Messrs Chew Sien Chee's letter, bundle C p 2, in the second para that he and his three other brothers (plaintiff excluded) had not instructed Chew Sien Chee to challenge the validity of the first will and to caveat the grant of probate or letters of administration. Referring to the same letter and the question asked that 'if the second will had existed, Chew Sien Chee would have knowledge of it', DW3 said that Chew Sien Chee had not shown them the second will and he would not know whether Chew Sien Chee would have knowledge of the second will. He added that Chew Sien Chee did not state in his same letter that there was a second will which would supersede the first will. He would not know whether Chew Sien Chee was aware of the second will. DW3 came to know of the second will in October 1999 but did not discuss or ask Chew Sien Chee to write to the lawyer Caroline Heah or to anyone to say that the second will superseded the first will. His reason was that his joint account with the deceased was frozen which he had to sort out and that he was staying in Vietnam until the Chinese New Year in 2000 when he instructed Chew Sien Chee to take action on his frozen account with his own money. He had not and did not want to discuss with Chew Sien Chee of the second will. As to why was it not part of the defence's pleadings that the second will was found in October 1999, DW3 said he could not comment as he was not the defendants. DW3 expressed dissatisfaction over Miss Caroline Heah for allegedly representing him when he had not so appointed her. For that he had instructed Chew Sien Chee to write to Miss

Caroline Heah and threatened to pursue for any loss or damage to the estate. He also complained against Miss Caroline Heah to the Advocates & Solicitors Disciplinary Board. DW3 agreed that the second will would affect all siblings but he made no mention when his lawyer wrote letters vide bundle C p 65 because there were unpaid bills of work done by Chew Sien Chee for the deceased. During the life time of Chew Sien Chee, there was no mention at all of the second will between DW3 and Chew Sien Chee. On the police report lodged by the plaintiff, DW3 said he came to know Koh Seong Hai (DW2) had been interviewed by the police; it was either Chung Keng Leng or Ch'ng Keng Cheang or both of them who had mentioned that to him. On the question that DW3 had no reason to dispute the first will, DW3 answered, 'you got the point. I had not disputed this first will at that time. It was until I found out that my money in the joint account was frozen'. On the relationship between the deceased and the plaintiff, DW3 said it was normal so was his relationship with the deceased and hence it was not a surprise for the deceased to name the plaintiff and him as executors and beneficiaries in the first will. He added that the relationship between his father and Chung Keng Leng was also normal. In re-examination DW3 stated that the discussion of the second will was between October 1999 and Chinese New Year in 2000 among the siblings and the plaintiff was also present. As to his joint account, he could not withdraw his money when that account was frozen. Regarding Chew Sien Chee's letter at last paragraph of p 66 bundle C, DW3 explained that by 'the estate of my late father', he was referring to the second will but he had never discussed the second will with Chew Sien Chee. On DW2 being interviewed by the police, DW3 said he had personal knowledge as he had discussed with his brothers Chung Keng Leng ('DW5') and Chung Keng Cheang. On the first will, he said Caroline Heah could not have done the first will for the deceased. By freezing his joint account with the deceased, that had nullified the first will.

[39] The fourth defence witness is the second defendant Law Cheng Hiang ('DW4'). She is the sister-in-law of the plaintiff and the first defendant having married their eldest brother, Ch'ng Kheng Cheang and a co-executrix and trustee of the second will. Before the deceased's death, DW4 said she used to visit him at house at No 67, Lebuh Binjai 2, Taman Sri Rambai, 14000 Bukit Mertajam where the deceased lived. She said the deceased did not at anytime tell her that he had made the second will. According to her, the deceased and the plaintiff did not have a good relationship as the plaintiff was constantly harassing the deceased for money. After the funeral ceremony of her mother-in-law in September 1998, DW4 said that the deceased told the plaintiff in the presence of all his siblings that he/the deceased would not tolerate anymore abuse from the plaintiff and/or his mistress and the deceased had openly denounced the plaintiff and told the plaintiff that he would not inherit anything from his estate as the plaintiff had already been given RM500,000 in cash previously. This evidence is contained in her witness statement, D42. In cross-examination, DW4 changed to say the plaintiff's

relationship with the deceased was just normal. The plaintiff stayed with the deceased in the deceased's house and the deceased died in his own house. The deceased initially lived with the plaintiff at house No 7, but two or three years before his death, he bought a new house No 67 and both the deceased and his wife moved to live in the new house. DW4 did not know whether the plaintiff and his second wife did live in house No 67. The deceased's funeral was held at house No 7. As to the incident in September 1998 during the 100 days prayer for her late mother-in-law, DW4 said she saw the deceased scolding the plaintiff but changed to say that the deceased told her that he scolded the plaintiff and that she did not witness the incident. And when asked what she heard from the deceased, DW4 said the deceased said the plaintiff lived with him (the deceased) and had always asked for money from him (the deceased). On being challenged further, DW4 said she did hear the deceased just told the plaintiff that he (the deceased) would only give the plaintiff RM500,000 but she did not hear the deceased scolding the plaintiff for harassing the deceased for money. DW4 then explained further that she did not know whether she only heard from the deceased that the deceased gave RM500,000 to the plaintiff but she did not see the deceased telling the plaintiff that he only gave the plaintiff RM500,000. As to the relationship between the deceased and the plaintiff's second wife, DW4 did not know. She did not know whether the deceased told the plaintiff in front of her that he could not tolerate the abuses of the plaintiff and his mistress. DW4 did not know about the second will and she did know whether anyone had discussed with her about the second will. She said it was the first defendant who told her that she was the co-executrix and trustee of the second will in October 1999. Before coming to court, she forgot whether she had signed any documents about the second will. When being referred a joint affidavit of all three defendants ('D30'), DW4 identified her signature in Chinese but could not remember whether she signed this affidavit alone or with others. She could not remember whether the first defendant was present when she signed it. She confirmed that she had never seen the second will. On the relationship between the deceased and Chung Keng Leng (DW5), DW4 said their relationship was not so good while her relation with the deceased was normal. DW4 agreed that it was not possible that her father-in-law (the deceased) would have appointed her as an executrix. In re-examination, DW4 reverted to say that she remembered the plaintiff had been scolded by the deceased due to money matters. She added, what she knew was that the deceased had given the plaintiff RM500,000 and asked the plaintiff not to interfere with the deceased's money. She said she could not remember whether the deceased had denounced the plaintiff. At to the contents of the second will, DW4 said she did not know but she agreed to be the executrix.

[40] DW5, Chung Keng Leng is another sibling of the first defendant and the plaintiff. Vide his witness statement, D38, DW5 said that his parents lived with him and his family from 1992–1996. He did not say whether his parents

then moved to live with the plaintiff but said that his parents moved out from living with the plaintiff and his family because his late father could not tolerate the plaintiff's verbal abuse and frequent harassment for monies. He stated that his father suffered a stroke in early 1999 on his trip to New Zealand and his condition deteriorated in the last few months prior to his death on 28 August 1999. In relation to the first will, DW5 said the plaintiff did not inform the siblings after the deceased's death. On 6 September 1999 in the presence of all siblings and their aunt after the death anniversary prayer of their late mother at Bukit Mertajam, the second defendant (DW4) asked the plaintiff to disclose any document of the deceased pertaining to his estate. The plaintiff was however evasive and did not reveal the first will. When all other siblings were discussing whether the deceased had given his last will to anyone of them to keep, the plaintiff then reluctantly admitted that he had all the deceased's documents including the first will. Subsequently the first defendant (DW1) informed DW5 that the plaintiff had asked that they were to meet at his lawyer's office the next day. The rest of his evidence as to the meeting on 7 September 1999 is almost the same as that of DW1 in relation to the first will. The first will, according to DW5 was not read by Miss Caroline Heah to him nor was he contacted for the reading of the first will. In October 1999, DW1 called to inform him that he (DW1) had found another will dated 31 October 1998 (the second will). On 5 December 1999 at the 100 days prayer of the deceased at the plaintiff's house, DW1 and DW3 confronted the plaintiff of lying and concealing all the documents of the deceased including the second will for which the plaintiff did not deny. DW1 at the same time gave a compact disc of the second will to the plaintiff. The estate of the deceased was RM2m, three pieces of land and two shoplots. His further evidence on the freezing of the joint account of the plaintiff with the deceased and the plaintiff had withdrawn those money in Asia Commercial Finance and the involvement of Miss Caroline Heah is substantially the same as the evidence given by DW1. DW5 said that before their mother had passed away, the deceased had given the plaintiff RM500,000 and after their mother had passed away, the deceased openly denounced the plaintiff from any involvement in his estate in the presence of all the siblings including the plaintiff and his second wife. DW5 said Chew Sien Chee was the deceased's lawyer. The deceased had never mentioned to all his brothers except the plaintiff that he had appointed Caroline Heah as his lawyer nor did he mention that he had made the first will through Caroline Heah. DW5 said he was a beneficiary in the second will with a token sum RM99.99 but his four children will inherit RM5,000 each. He added that the deceased was familiar with the names of his children and could pronounce their names correctly. The plaintiff's children born of his first wife will also inherit from the second will but not his children born of the second wife. On his relationship and the first defendant's relationship with the deceased, DW5 said it was good. As regards his parent's trip back to Malaysia from Canada, DW5 said he paid for their travelling expenses. When being challenged with DW4's evidence where she had stated she had no knowledge as

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to what happened on 6 September 1999; she had no knowledge whether the plaintiff gave all sorts of excuses and was evasive, whether the plaintiff admitted that he was in possession of their late father's documents and whether all the male siblings were told to meet Miss Pow at Ciku Lane, DW5 disagreed what he had said in his witness statement was not true. On appointing lawyer Chew Sien Chee, DW5 said that Chew Sien Chee was appointed to rectify the wrong representation of his youngest brother DW3 by Miss Caroline Heah but not to challenge the first will. Pertaining to the letter from Chew Sien Chee (bundle C p 1) to Caroline Heah, DW5 stated with hesitation that Chew Sien Chee wrote the letter on his own without DW5's instruction although the letter expressed that Chew Sien Chee was acting for DW5 and the other brothers. As regards the bills from Chew Sien Chee for services rendered to the deceased, DW5 agreed that all those bills were dated after the second will but Chew Sien Chee had not talked and had never told DW5 about the second will. He maintained that his relationship with the deceased was good in spite of letters written by the deceased against him (bundle D pp 22, 24 & 28). He alleged that the relationship between the plaintiff and the deceased was bad as the plaintiff had openly harassed the deceased. On being challenged as to why the deceased had made the plaintiff a joint deposit holder and share holder in his company, DW5 said it was for convenience but he could not explain 'convenience'. On being questioned that the deceased had left all the money in the joint account to the plaintiff but had withdrawn all money in the joint account with DW5, he said it was up to his father, the deceased. He agreed that if the intention of the deceased was to give the money to the plaintiff, he had no knowledge of it. He also had had no knowledge that even at the deceased's death, the plaintiff and his second wife were still the directors of the deceased's company. In relation to the second will, DW5 denied that the deceased who could not read and understand English, could know the English names of all the beneficiaries and spell them correctly. He asserted the deceased was a Teochew and could not understand Hokkien. He disagreed that the second will was not the deceased's will. Pertaining to the first will, he agreed that he had not objected to the contents of the first will when he signed on the envelope containing the first will but said that the envelope was blank. He said his father could not have appointed Caroline Heah to do the first will. On DW2, Koh Seong Hai, who is his cousin, DW5 said DW2 could be easily located by Chew Sien Chee. In re-examination, he explained 'convenience' for the joint account was that the deceased travelled a lot and thus needed the statements of account to be addressed to the joint account holder so that the deceased could be contacted by phone calls. As to the appointment of Chew Sien Chee, DW5 explained that Chew Sien Chee had approached them for payment of services rendered to the deceased and they naturally appointed him to continue acting but DW5 did not give instruction to Chew Sien Chee to contest the first will when Chew Sien Chee wrote the letter regarding the freezing of the account. DW5 said he represented all his brothers except the plaintiff and his instruction

was not to challenge the first will. As to the letters bundle D pp 22 and 24 written by the deceased condemning him, DW5 said it was common practice of his father to do so.

[41] DW6 is the senior assistant registrar of the Penang High Court who was called to produce the original second will which had been filed in Probate Case No 32–32 of 2000. This court noted that the original second will was type-written in black; the signature at the column for Chung Beng Eng (the deceased) was a signature signed in blue ink whereas the signature above the handwritten name 'Koh Seong Hai' and the writings of name, identify card number and address were in black ink and the signature below Koh Seong Hai and above the smaller name chop of 'Chew Sien Chee' was in black ink; the small chop and the bigger chop of 'Chew Sien Chee & Co' were in black. The other handwritten date and the name Chew Sien Chee at p 4 of the second will were in black. Miss Karen Lim, learned counsel for the plaintiff also urged this court to note that the date and the handwritten name of Chew Sien Chee were written in thin ink as compared with the handwritten name of Koh Seong Hai, his NRIC and address which were in broad ink. In noting that, this court also notes the signature above the name chop of Chew Sien Chee appears to be signed in thin ink as that of a fountain pen with sharp nib. After all parties had examined the original and a certified true copy of the same, the certified true copy was tendered and marked as exh D41. As requested by learned counsel for the plaintiff to record so, this court had noted down the production of D41 does not tantamount to the plaintiff admitting that that was the last will of the deceased.

[42] DW7 Harcharan Singh a/l Tara Singh is the last witness for the defence and he is the defence's expert witness. His evidence-in-chief is vide his witness statement, exh D42. He had outlined his qualifications and experience as well as having given evidence in a court of law and that his evidence had been accepted by the court. This court also accepts him as an expert witness pursuant to *Wong Chop Saow v Public Prosecutor*. Although DW7 may not have the academic training in forensic science particularly in handwriting examination, his practical experience as supervisor of handwriting experts in the chemistry department can be regarded to qualify him as an expert for the purpose of determining the authorship or the genuineness of signature or otherwise; see *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 FC. DW7's role in this case is that he examined the questioned signature of the deceased as contained in the original second will in Penang High Court on 10 December 2004 and had taken close-up photographs of the said signature. For comparison, he had used nine original standard signatures contained in two sets of original documents marked as 'SS1' and 'SS2' given to him by the defendants' solicitors. 'SS1' was dated 18 November 1993 while 'SS2' was a contract dated 3 April 1996. He said that eight to ten specimen signatures

which were contemporary and executed on documents of equal importance as the questioned signature would suffice for comparison and an examiner should not go on a 'fishing trip' for many standard signatures to look for something 'to fit or not fit his conclusion'. He found the specimen given to him which were signed from 1993–1998 and the disputed signature which was signed in 1998, were roughly contemporary in time. He also found the specimen signatures were mostly 'fairly' consistent in pictorial impression or spatial configuration but had some natural variation. Having compared them, DW7 concluded his opinion that the questioned signature marked as 'Q' had a common authorship to those specimen signatures and is the true and genuine signature of the deceased, Chung Beng Eng. His conclusion was based on similar pictorial impressions and spatial configurations of the questioned signature with the specimen signatures taking into account that there were some usual natural variations in the specimens. He found the questioned signature to be written in one smooth stroke/ pen movement without any pen lift and did not have any tremor or hesitation in its formation of the sub-strokes; it was executed in one smooth line trace, a fluent structure. In determining common authorship, it cannot base solely on differences in physical measurements of the strokes or sub-strokes which depended on the speed of writing; if written fast, there will be a tendency to drop some sub-strokes. On the variation in the letter design, DW7 said he found a fairly wide variation in the 'structure' and 'construction' of the specimen signatures but he found regularity in the rhythm of the questioned signature and the specimen signatures. DW7 also stated that specimen signature marked as 'S12' being a signature on an important document ie a passport, had been executed in almost the same manner as the questioned signature on a will. In cross-examination, DW7 said the nine specimen signatures provided to him were from the period 1993–1996 whereas the questioned signature on the second will was in 1998. He agreed that specimen signatures must be as contemporaneous as possibly but stated that the range of five years is contemporaneous as long as there is no change in pictorial impression. He disagreed that specimens in 1998 would be as contemporaneous as possible but if sample signatures in 1998 were available, he would use them for comparison. In this case, DW7 did not ask for the contemporaneous specimen although it is standard instruction that he would always ask for in every case. He said he was not given or that they were not available. He agreed that the specimen signatures S35–S41 used by the plaintiff's expert, SP2 were the most contemporaneous specimen in respect of the questioned signature. DW7 basically based his finding or conclusion on pictorial impression, the allograph, the dynamic or the speed in writing of the signature. Although he agreed that the specimen signatures as contained in the sales and purchase agreement, company resolution, passport etc used by SP2 were good for comparison, he contended that SP2's interpretation was wrong like a school boy. He alleged that SP2 looked for differences without looking at the overall picture. To constitute differences, there are three criteria ie they must be consistent, significant and fundamental. He agreed that these three

main features that consistently appeared in the specimen signatures marked S35 to S41 are the main body collapsed against the base, with three levels and with two or more parts merging as in SP2's report at para E2 but disagreed that they were significant and fundamental because of dynamic in writing at different time. He endorsed the differences between specimen S12 and the questioned signature marked 'Q' but explained that S12 was written in confined space but not 'Q'. He stressed that comparison is two ways process ie not only looking for differences but also similarities. He disagreed that if the specimen is not of similar environment, it is not of good comparison as in his specimen 'S1' but when being challenged with his own article reported in [2006] 5 MLJ xlviii, he agreed that he had so stated that to be a good comparable, it had to be of a similar environment and condition but qualified to say that if the samples were with natural variations, they could still be used. DW7 said he did not disagree that differences are important but they must be taken along with similarities and added that his logical explanation for the differences is the behavioural nature and dynamic or speed nature of the signatures.

EVALUATION FINDINGS

The first issue: Whether the deceased had made the first will dated 29 August 1997

[43] Evidence of Miss Caroline Heah (PW3) is unequivocal that through her mother, she came to Bukit Mertajam and met the deceased personally to take instruction to prepare the deceased's will. After preparing this will, she made her second visit to Bukit Mertajam about two weeks later with the will which she personally explained to the deceased of its contents and the deceased having understood then signed in her presence and the presence of her mother Madam Pow Khoon Sim. It was on 29 August 1997. PW3 and her mother signed as witnesses to this first will. This first will was prepared in two copies. Having signed them, the original was kept in a brown envelope with typewritten words 'The Last Will & Testament of Chung Beng Eng' and was given to the deceased while PW3 kept the duplicate of it. She identified her signature as well as the signatures of the deceased and her mother as the second witness in this first will which was produced as exh P2. Before she read the contents of the will to plaintiff (PW1) and the first defendant (DW1), the first defendant declared to her that he represented the other brothers who were not present. PW3 had compared the original will in the brown envelope which then contained the signatures of all the siblings of the plaintiff, handed over to her by the plaintiff and found the original will to be the same with the duplicate that she kept. This fact was endorsed by DW1 who affirmed in evidence that PW3 did that. There was no objection nor dispute by DW1 as to this will not being prepared or witnessed by PW3 and Madam Pow nor as to the deceased's signature thereon. DW5, Chung Keng Leng, the other sibling of the plaintiff and the first

defendant, had agreed in his evidence that he had not objected to the contents of the first will when he signed on the envelope containing this will. The only slim evidence led in the defence that PW3 could not be the person who prepared the first will came from Chung Keng Chiew (DW3) who had apparently expressed great dissatisfaction against PW3 for freezing his joint account with the deceased in the bank whereby he could not withdraw the money which was his though placed in joint name with the deceased for a long duration of time. This had resulted in his complaint against PW3 to the Bar Council. DW5 did say that the deceased could not have appointed PW3 but gave no reason. Apart from the defence's assertions in court, there is not an iota of evidence to show or raise a doubt that PW3 could not have prepared and witnessed the deceased's signature on the first will. I find that DW3's bare assertion in this respect to have arisen out of his grudge against PW3 for freezing his joint account with the deceased.

[44] From the evidence as a whole, I find PW3 to be a credible witness, cogent in her evidence and there is no doubt for me to reject her evidence. On a balance of probabilities and upon a finding of fact, I hold that the first will (P2) was prepared by PW3, duly signed by the deceased in the presence of PW3 and Madam Pow who witnessed the deceased's signature thereon and that this first will was duly executed on 29 August 1997 as the last will and testament of the deceased; hence it was a valid will. However, whether this first will is still effective will depend on the determination of the validity of the second will in the following issue.

Second issue: Having regard to all the circumstances of the case, whether the deceased could have made the second will on 31 October 1998 and whether the signature of the deceased in the second will was his or whether this second will was a probable forgery

[45] The crux of the defence's case is indeed on the existence of this second will which the plaintiff challenged relentlessly to be not the deceased's will and that it was a forgery. This second will was dated 31 October 1998 and if it is proved to be valid and effective, it being purportedly made on a date later than the first will, would naturally supersede the first will as the last will and testament of the deceased to be admitted to probate. Otherwise, the first will shall be the last will and testament.

DISCOVERY OF THE SECOND WILL

[46] In the defendant's pleadings vide their statement of defence in bundle A p 28 para 17, it was pleaded that the first defendant had found the second will among some photographs. No other facts were pleaded as to when and where he had found it. From the first defendant's witness statement (D28) and his oral

evidence in court, no evidence was led as to when and where he had discovered the second will. He was even silent on his alleged discovery of it among some photographs. At one point, the first defendant was attempting to say he found the second will in Canada but this fact was not so pleaded. If it is a fact that the second will was truly found in Canada, such pertinent fact ought to have been pleaded. Unfortunately, it was not. It is trite that any unpleaded fact ought to be rejected as trial should be confined to the pleadings; see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 as cited by the Supreme Court in *Yew Wan Leong v Lai Kok Chye*. Chew Sien Chee, the lawyer who allegedly prepared and attested the second will as a witness was not shown to have raised this second will even after the death of the deceased which Chew Sien Chee was aware having attended the deceased's funeral. I find no evidence how this second will came into being but that it only surfaced at the 100 days prayer for the deceased after his demise.

PREPARATION OF THE SECOND WILL (EXH D41)

[47] It is the defendant's case throughout this trial that this second will, D41, was prepared by a lawyer Mr Chew Sien Chee who had since passed away in March 2000. On the preparation of this second will, learned counsel for the plaintiff had submitted that there were suspicious circumstances from the contents of this will itself which indicate that this will could not have come from the hands of a lawyer. On suspicious circumstances, learned plaintiff's counsel cited a passage from *Theobald on Wills* by JB Clark, *(14th Ed)* at p 35 where the learned author said:

> (c) Suspicious circumstances. If a will was prepared and executed under circumstances which raised a well-grounded suspicion that the will (so some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it.

[48] It was further submitted that the legal burden lies on the party propounding the will to prove that the testator knew and approved of the contents in the will at the material time. Learned counsel for the plaintiff referred to the same book at p 34 which states:

> Burden of proof. The legal (or persuasive) burden of proof always lies upon the person propounding a will to prove that the testator knew and approved of its contents at the relevant time. He must 'satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator'.

[49] She also cited the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 which held the same. I must agree.

[50] In general, it does not derogate from the burden provided under the Evidence Act 1950 that he who asserts the facts must prove that fact: s 101 and the evidential burden under ss 102 and 103 of the same Act. Hence the burden is on the defendants propounding the second will to prove it to be the valid last will and testament of the deceased.

[51] Reverting to the second will, D41, the suspicious circumstances raised in relation to its preparation is that this second will did not carry the identify card number of the deceased being the testator as well as those of the executors and trustees, ie the three defendants named therein. I find this suspicion raised to be tangible and it merits consideration. Citing the name and identify card number of the testator and executors and/or trustees are so fundamental a prudent practice and requirement that no solicitor preparing an important document such as a will would have missed or ignored to follow. The defendants propounding this second will did not afford any explanation as to how Mr Chew Sien Chee could have missed or ignored such vital details if D41 was allegedly prepared by him. A failure to include the IC numbers of the testator, executor and trustees in a will prepared by a lawyer, to this court, is an abnormal act and could not have been expected to come from a conscientious practising lawyer. I reckon this omission as suspicious circumstances. In addition, according to Koh Seong Hai (DW2), the surviving witness to D41, he saw Chew Sien Chee taking the deceased's identify card and comparing the IC with the name and IC number of the deceased in this will. If that was true, it is highly unconceivable and improbable that Chew Sien Chee would still have proceeded to attest the will when there was such a glaring omission or error, if he had truly checked the deceased's name and IC number from the deceased's IC, and would yet deliberately fail to amend or cause to be amended such an important document allegedly prepared by him which would affect his integrity as a diligent lawyer. This doubt that remains throughout the defence's case in the trial, gives rise to the probabilities that D41 might not have been prepared by Chew Sien Chee as claimed by the defence.

[52] On the plaintiff's submission that the deceased being illiterate in English could not have given all the English names of the children of the first defendant and other grandchildren such as Bellgene, Winson, Winser, Beverly Belshan, etc in the second will, that may be so but I am prepared to give the benefit of the doubt to a grandfather who ought to be reasonably presumed to know the name of his grandchildren and would otherwise have obtained them if he so desired to bequeath them with some of his legacy. I find this is not a convincing ground to create suspicion in the deceased's knowledge of the name of his grandchildren.

[53] The date of this second will was 31 October 1998 which fell on a Saturday. The plaintiff said that he was the one who would always be asked by

the deceased to drive him wherever he wanted to go and the plaintiff stated that he had not driven the deceased to the office of Chew Sien Chee on 31 October 1998. PW4, the sole daughter in the family was admittedly very close and attached to the deceased. She had been, after the death of her mother, visiting the deceased every weekend from Friday night to Sunday without fail. She too confirmed that the deceased had not gone to Chew Sien Chee's office on 31 October 1998, a Saturday; otherwise she would have known of it. She further confirmed that the deceased had been telling and/or showing her the first will and showing it to the plaintiff and the plaintiff's family. PW4 was and is never a beneficiary to any of the first or second will. She had openly announced to the deceased that she would not accept any bequeath from the deceased and she even transferred the double storey house bought by the deceased and registered in her name back to the deceased during the deceased's lifetime. PW4 and her husband operates an engineering firm and she was contented with what she had. I find that PW4 is an independent and not an interested witness when she gave evidence in favour of the plaintiff; see *Karthiyayani & Anor v Lee Liong Sin & Anor* [1975] 1 MLJ 119. I have no reason to doubt what she said. Apart from Koh Seong Hai 's evidence which I shall discuss below, there is no evidence to rebut PW4's evidence which corroborated the plaintiff's evidence that the deceased was not taken to Chew Sien Chee's office on a Saturday ie 31 October 1998. This is yet another improbability which raises a doubt that the deceased could have been to Chew Sien Chee's office on 31 October 1998.

ATTESTATION OF THE SECOND WILL

[54] The defence's key witness that they relied to prove the second will is Koh Seong Hai (DW2) who is the cousin of the siblings and the brother-in-law of the lawyer Chew Sien Chee. In DW2's evidence in court, he said that when he arrived in Chew Sien Chee's office on 31 October 1998, the deceased was already there and the deceased had asked him (DW2) to sign his will. He then saw Chew Sien Chee taking out his file, opening it, taking out the will and reading the contents to both of them. However, in his affidavit sworn on 11 September 2000 ('P31') which he initially denied having made any sworn statement but admitted having made P31 upon it being shown in cross-examination, he affirmed the following facts:

(6) Pada hari Sabtu, 31 hb Oktober 1998, seperti biasa, saya telah pergi untuk berjumpa dengan Chew (Chew Sien Chee) di pejabatnya pada pukul lebih kurang 10.00 pagi.

(7) Pada lebih kurang pukul 10.30 pagi saya nampak Chung (the deceased) masuk ke dalam pejabat Chew dengan 2 sampul surat di dalam tangannya. Saya cuba untuk mengundur diri dari bilik Chew pada masa itu tetapi Chung telah menyuruh saya untuk berada di situ.

(8) Chung telah mengeluarkan dokumen-dokumen dari sampul surat dan menyuruh Chew untuk membaca dan menterjemahkan isi kandungan

dokumen-dokumen tersebut dalam bahasa Teochew. Dari apa yang dikatakan oleh Chew saya faham bahawa dokumen-dokumen tersebut merupakan wasiat Chun

(9) ...

(10) Chung dan Chew telah menyuruh saya untuk menjadi saksi kepada tandatangan Chung di wasiat tersebut.

[55] His statements of fact as sworn in P31 are contradictory to his oral evidence in court in that in P31, he was already in Chew Sien Chee's office before the arrival of the deceased; whereas in his oral evidence, the deceased was already in Chew Sien Chee's office before DW2 arrived. In P31, the deceased was carrying two envelopes when he came to Chew Sien Chee's office and the deceased took out his will from the envelope and asked Chew Sien Chee to read and translate whereas in his evidence in court, he said the will was in Chew Sien Chee's file; Chew Sien Chee took out his file, opened it, took out the will and read to them. Although these obvious contradictions had been pointed out to DW2, DW2 only attempted to say it was too long. Nevertheless, he disagreed that what he said in para 7 in his affidavit P31 was totally inconsistent with what he said in court. In other word, by disagreeing with the suggestion put, DW2 is saying that para 7 which he affirmed that the deceased was the one who had the two envelopes in his hands was consistent with what he said in court that Chew Sien Chee was having the will in his file. From the above conflicting evidence, the credibility of DW2 is put at stake as he was prepared to lie demonstratively. His evidence must therefore be treated with suspicion. DW2 stated that Chew Sien Chee had requested for the IC of the deceased and he saw Chew Sien Chee checking the name and IC number of the deceased on the will with those in the IC. This evidence of his cannot be true for the simple reason that this second will (D41) does not carry the IC numbers of the deceased nor those of the two named executors and trustees. In relation to the purported signing of the second will by the deceased, DW2 said the deceased signed first, followed by Chew Sien Chee and then by himself. He added that the arrangement of the signatures on the second will was the deceased's signature on top, the solicitor's signature was second and his signature was at the last. However from D41, the second will, it was his signature at the second position and Chew Sien Chee's signature was at the last.

[56] On the purported signature of the deceased, DW2 when being challenged in cross-examination that the alleged signature of the deceased in the second will was signed in blue ball point and not in black ink, DW3 disagreed and had explicitly maintained that the deceased signed in the second will in black ink. This is indeed in direct contradiction with the original second will produced by the senior assistant registrar, DW6, wherein the purported signature of the deceased was signed in blue ink. In re-examination, DW2 attempted to explain that the deceased used his own pen to sign but he and

Chew Sien Chee signed with another pen. I do not find his explanation plausible because he did not say so during cross-examination but was very assertive that the deceased signed his signature in black. I find DW2 was caught point blank to have lie so openly. Had the deceased actually signed in his presence, and his fundamental role as the attesting witness was to witness the deceased's signature he must truly witness that signature of the deceased. The fact that DW2 was unable to even say in what colour of the ink that the deceased had allegedly sign his will only leads to the grave doubt whether DW2 had actually witnessed the deceased's alleged signature.

[57] In relation to the date in the second will and Chew Sien Chee's handwritten name, DW2 said initially that Chew Sien Chee wrote the date and his name first but said that he just 'agak-agak' that the date and name were written first before the deceased signed. From learned counsel for the plaintiff's request to note the difference in the handwritten writings of DW2's particulars and signature comparing with those of Chew Sien Chee in term of the pen used, I have observed the pen impressions to sign and to write DW2's particulars was broader and the signature and handwritten name of Chew Sien Chee to be in a thinner ink as that of a fountain pen with sharp nib. This is clearly visible on naked eyes. This again refuted DW2's evidence that he wrote and signed with the same pen passed to him after Chew Sien Chee had so written and signed with that pen.

[58] I have also observed the demeanour of DW2 when he gave evidence. More than often, he took time to answer questions posed, evasive and at time gave no answer. Questions had also sometimes to be explained several times before he could answer them. He does not appear to be a truthful witness.

[59] From the whole evidence of DW2 coupled with numerous material inconsistencies and his demeanour, I find that DW2 is not a credible and reliable witness but a witness who has an axe to grind as he was prepared to lie and gave conflicting evidence. It is most unsafe to rely on evidence that is full of inconsistencies and uncertainties. The defence had failed to advance any reasonable explanation nor lead any evidence to clear all lingering doubts and all the inconsistencies which remained at the end of the trial. Therefore, this court finds that no weight ought to be accorded to DW2's evidence and his evidence that he had witnessed the deceased affixing his signature on the second will which this court finds grave doubt is consequently rejected on a balance of probabilities upon positive finding of facts above. There is no other evidence to prove that the second will was properly attested apart from DW2's evidence. On this ground alone, the defendants cannot be said to have proved that the deceased had made or seen to have signed the second will on 31

October 1998 ie its execution on a balance of probabilities.

THE EXPERT EVIDENCE

[60] Despite the above findings, this court will also consider the evidence of both the plaintiff's and the defendant's handwriting experts who gave conflicting views or opinions. In *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, His Lordship Hashim Yeop A Sani J (as he then was) held that the evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty and that it has always been accepted that expert evidence especially of handwriting can never be conclusive. In *Sim Ah Song & Anor v Rex* [1951] MLJ 150, Brown Ag CJ has held that:

> Where expert evidence is given to 'explain' the nature of a document, the expert should 'explain' its contents by 'explaining' the technical and unintelligible terms contained in it. The responsibility for the determination of every question upon which expert evidence is called, rested upon the court and not upon the expert.

[61] The role of an expert is to explain the technical part of the document, handwriting or signature as in this case and gives his opinion upon his analysis which must be coupled with his reasons. It is purely to assist the court which shall determine upon the questions or issues for which the expert was called. The final determination of the question or issue is upon the court to arrive at and it is certainly not the opinion of the expert which decides on it; otherwise, it is the expert who determines the question or issue and not the court; the court is the final arbiter, not the experts or eyewitness; see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 FC. The court must form its own decision in the light of the evidence given by the expert; see also *Chin Sen Wah v Public Prosecutor* [1958] MLJ 154.

[62] The plaintiff's expert Mr Siew Kwen Sia (PW2) said he had obtained and used 41 sample signatures (from 1992–1999) for the purposes of comparison with the questioned signature ie the alleged signature of the deceased on the second will which he marked as Q. He explained that he used many specimens in this case because the specimens vary in many ways which he had listed at pp 45 and 46 of bundle C in his report and their photographs are at pp 49–59. PW2 explained the reasons for using 41 specimens in his report at p 44 as follows:

> Normally about ten specimen signatures are sufficient to cover the variation shown by the specimens. However, in this case, the specimen signatures appear to vary from time to time. This is because of the simplicity of its structure coupled with the freedom of execution of the signature. Thus, a larger number of specimen signatures

ie forty-one (as shown in Fig 1 to Fig 5) is used to study the variation of the features in the specimen signatures before the authorship of the questioned will signature is determined.

[63] PW2 then went on to analyse all the natural variations in the specimens before concluding that the specimen signatures of the deceased vary in many ways. He compared the questioned signature 'Q' with all the specimens and noted the features in 'Q' that distinguish from the specimens (see pp 45–46 of bundle C). On account of the 41 specimen signatures varying widely from 1992–1999, PW2 focused on the contemporary specimens of the years 1998 and 1999 which he marked S25–S41 for his examination with the questioned signature which was purportedly signed on 31 October 1998. From these specimens S25–S41, PW2 found two predominating features in them ie the horizontal three protrudes to the right of the horizontal above it (horizontal 2) and there were two or more areas of merging but these features are not found in the questioned signature 'Q' (ref: p 47 of bundle C). He then went on to narrow down the specimens to the periods from 29 June 1998 to 25 June 1999 which are the periods closer to the time the questioned signature was allegedly made. These specimens are S35–S41. From these narrowed down specimens, he found three common characteristics ie simplified to three (two in S38) levels; two or more areas of merging and a general tendency to flatten against the base stroke. These common characteristics were however not found in the questioned signature Q. PW2 found that 'despite the various possibilities of variation in the specimens, none of them has the same combination of features as the questioned signature Q' and 'more significant is that the questioned signature 'Q' lacks the features that allow it to be placed among the specimens in the same time period as the date of execution of the purported will (31 October 1998)'. He therefore concluded that the questioned signature 'Q' on the said last will and testament dated 31 October 1998 is of different authorship from the specimen signatures of the deceased.

[64] Defendant's expert Mr Harcharan Singh Tara (DW7) on the other hand, had used nine specimens in his comparison. They were from the period between 1993–1996. According to him, 8–10 specimens suffice for comparison purposes. It is admitted that from these nine specimens, seven were signed in 1993 while the other two were signed in 1996. According to DW7, specimens within the range of five years are contemporary. He disagreed that there should be specimens from 1998 to constitute contemporary since the questioned signature was purportedly signed on 31 October 1998, the date on the will. He said there is no change in the structure of the signature and hence the specimens were contemporary. From DW7's report at bundle C pp 12–40 at p 13, he reported that the standards or specimens were roughly contemporary in time basing on the standards 'ranging from 1993–1998 and the disputed signature was signed in 1998'. This is undoubtedly untrue and

wrong because from the nine specimens supplied and used by him seven were from 1993 and two from 1996. No specimens of 1998 were ever given to him. By 'contemporary' or 'contemporaneous', they mean existing, occurring or originating at the same time or in the same period of time. I must say that to construe a period of five years and about as 'contemporary' is a desperate attempt to stretch the meaning of 'contemporary' beyond imagination. If DW7 were to construe otherwise ie that five years is not contemporary, then he would have left with only two specimen signatures in 1996 to make the comparison which would be fundamentally flawed as the minimum requirement seems to be 8–10 specimens. Since the questioned signature was from 31 October 1998, specimens that are contemporary, by the meaning of the word, ought to be existing, occurring or originating at the same time or in the same period of time. I am of the view that a period of six months before and/or six months after 31 October 1998 could reasonably be construed as contemporary bearing in mind that signature may not be a frequent or routine act of the signatory. Even to over stretch it, a year before and/or a year after may reluctantly be acceptable but to stretch it more than that cannot be accepted as 'contemporary'. As regards the 41 sample signatures used by PW2 Mr Seow, DW7 criticised PW2 to be on 'fishing trips' for more standard signatures to 'fit' or 'not fit' his conclusion and emphasised that 8–10 standard signatures of roughly contemporary in time should suffice. Having perused PW2's report in bundle C pp 42–60 (a copy of the coloured specimens was supplied to court), I do not find so. The examination of the many specimens was to determine whether there were variation in the structure of those signatures and what were the peculiar features that could be gathered to facilitate a proper comparison. From these specimens, PW2 was able to identify the predominating features of the specimen signatures. Using those features, PW2 narrowed down the comparison of the disputed signature with only samples between the period 29 June 1998 to 25 June 1999 since the questioned signature was purportedly signed on 31 October 1998. There was no attempt by PW2 to tailor his comparison of the questioned signature with selected or random specimen although there were specimens in 1992, 1994, 1996, 1997 but to confine his final comparison to the specimens between 29 June 1998 to 25 June 1999. I find no merit in the implication or criticism of DW7 to cast on the intent of PW2 to use more samples. I am inclined to agree that in view of the signature of the deceased being in the form like a double 'z' with one on top of the other joined by a slanting stroke which was found to be variable from the specimens from time to time, more samples could most probably assist the expert in arriving at a more accurate assessment. I find support in *Suspect Documents Their Scientific Examination* by Wilson R Harrison (3rd Indian Reprint) 2003 p 459 on the number of genuine signatures to be used for comparison where the learned author said:

> The minimum number of signatures which should be made available for comparison depends on many factors. If the handwriting of the testator is good and the will or agreement was signed when in good health, then a dozen contemporary signatures should be sufficient in the majority of cases. If the handwriting of the testator is of poor quality and variable, then the more signatures made available for comparison the better. It is one thing to have to say in evidence, 'I have examined six undoubted signatures of the testator, but although they all showed considerable variation I failed to find in any one the combination of handwriting characteristics found in the questioned signature, consequently I consider it unlikely to be a genuine signature'; but it is far better to be able to state that a considerable number of genuine signatures had been examined with the same result. The more signatures of a poor and variable writer available, the stronger is the opinion which can be expressed as to the authenticity of a questioned signature.

[65] Indeed, in *Scientific Examination of Questioned Documents* by Ordway Hilton, (Revised Edition), on the 'amount of standard writing', the learned author had suggested that more specimens could probably reveal accurately the writer's habits, ability and range of variation when he said of the following:

> That everyone does not sign his name or write any combination of words in exactly the same way twice is one of the more complicating elements of handwriting identification. This natural variation must be revealed by the known writing. Variation in writing is a personal factor — it is not the same for each individual either in extent or nature. Besides, it can be influenced by the conditions under which the writing was done. Here is the reason that no hard and fast rule can be set for a minimum number of signatures or a minimum amount of general handwriting.
>
> With many problems, 10 or 20 signatures should constitute an adequate sample, but there are a certain number of cases that may require 30, 40 or even more signatures in order to accurately reveal the writer's habits, ability and range of variation. *Actually it is poor policy for the investigator to be satisfied with the bare minimum when just a few additional specimens can greatly fortify the findings.* (Emphasis added.)

[66] PW2 had followed the guided principles in acquiring more specimens to assist him in the determination of the authorship of the questioned signature and cannot be faulted for doing so. In this respect, I am in favour of PW2's methodology of using more specimens that can greatly fortify his findings. The allegation of fishing expedition by DW7 does not occur and has no basis but said in unwarranted bad faith. From all the specimen signatures, Mr Seow, PW2, had laboriously identified all the various ways that the specimens vary; he compared all the specimens and determined seven features in the specimens before comparing them with the questioned signature which he found to be more regular, orderly and open than in the specimens. He then confined the comparison by using the specimens from May 1998 to 25 June 1999 marked S25–S34 where he determined two predominating features and finally he only

narrowed down the comparison with the contemporary specimens between 29 June 1998 to 25 June 1999 when he found three common characteristics. Using these three common characteristics as the basis for his comparison with the questioned signature, he made his findings as has been recapitulated in the preceding paragraph above (refer p 48 of bundle C). Mr Harcharan Singh, DW7, relied basically on the pictorial impression or allographs which are specific forms of graphemes such as a printed character or alphabet, the fluency in the questioned signature ie with no tremor or hesitation in their formation or the dynamic or speed of the writing to hold that the questioned signature did not differ from the standards or specimens. His nine specimens marked by him were SS1 (a)–(h) and SS2. However, in his report at bundle C pp 15, 16 and 17, he had used standards marked 'S14, S15, S16', 'S23, S24' and 'S3, S12, S24' for comparison and to form his opinions. These are the specimens used by the plaintiff's expert. DW7 had been canvassing that as long as an expert 'has about 8–10 standards signatures which are roughly contemporary in time, executed on documents of, as equal importance as the questioned signature', that suffices for the comparison and there is no need to fish for more specimens to fit or not to fit the expert's conclusion; see p 17 of bundle C of his report at para 17(i). He had nine standards which according to him, suffice for his comparison and there is no need to fish for more but he appears to slap on his own face when he did fish from PW2's specimens to make comparison and to form his opinion. The reasonable inference to draw in the circumstances is that DW7 had insufficient specimens to enable him to arrive at an accurate opinion. I am certain that DW7 with his experience is well aware that insufficient standards for comparison will vitiate his role to identify a questioned signature. This is as stated in *Forensic Science in Criminal Investigations & Trials* by Dr BR Sharma at p 578:

> An expert may fail to identify a questioned writing because of insufficient standards for comparison. A large number of standards has never been a handicap.

[67] Despite having the benefits of PW2's specimens, DW7 was nevertheless selective to choose only samples which are not as contemporary as what PW2 did for his final analysis and comparison with the questioned signature. The most contemporary specimens are S35–S41 which formed the basis of PW2's comparison and conclusion but they were never referred to nor used for comparison by DW7. Had DW7 been fair and honest as an expert witness, S35–S41 which are the closest specimens to the time of the questioned signature, would have been selected by him to be used for comparison and to arrive at a decision or finding which would probably assist him to achieve a more accurate opinion or stronger opinion as expressed by Wilson R Harrison. I do not find DW7's opinion basing on the selective specimens of PW2 and the non-contemporary specimens to be comprehensive and convincing to be preferred by this court.

[68] DW7's basis of concluding common authorship of the questioned signature is on the pictorial impression. He said the structure of the signature is the same. Learned counsel for the plaintiff submitted what has been pointed by the learned author David Ellen in his book *The Scientific Examination of Documents Methods and Techniques* (2nd) Ed at p 16 that:

> Although there seems to be scope for very many writings which are recognizably different at a quick glance, there are far more writers than can be accommodated by the number of such variants. It follows, therefore, that the writings of many people share a common overall appearance. This means that as an indication of two similar writings being by one person, the quick glance at overall appearance is as unreliable as it is when apparently different writings are taken to indicate two different writers. There is far more scope within the detail of writing to separate different writers than there is in overall appearance.

[69] Wilson R Harrison at p 520 of his same book cited above said of the following for which DW7 seems to have ignored:

> The next step is to establish that it would prove impossible for even the most skilled forger to reproduce every characteristic, whether obvious or concealed of the handwriting he is attempting to copy and yet write fluently; also the fact that when a handwriting is copied, it is generally sufficient for the forger to concentrate on reproducing the pictorial effect which is largely governed by slope and the more obvious features of letter design.

[70] I am of the view that the very first thing a forger will do would be to copy as closely as he could the pictorial aspect of a writing with the primary intent that at a glance, no one would suspect the forgery from the pictorial impression. I do not think that any general viewers of the writing or signature would attempt to decipher details unless they are called to. Hence, by relying on the basis of the pictorial impression without analysing the details in his comparison of the specimen signatures with the questioned signature would certainly be unreliable and this without more should not be the basis expected of an expert. 'The pictorial effect is the general appearance of the writing. A forger, if he is to succeed, must imitate the pictorial effect. One, therefore, must not go by the pictorial effect. 'Appearance are deceptive' is literally true in handwriting identification': per Dr BR Sharma in his book *Forensic Science in Criminal Investigation & Trials* (4th Ed) p 586. I therefore agree with the plaintiff's submission that pictorial impression and fluency in writing are insufficient to come to a just opinion on the common authorship of the questioned signature. DW7 as an expert should be more comprehensive in his approach. The distinction between an expert and a non-expert is that an expert will make a detailed examination whereas any non-expert can just look at the pictorial impression and the fluency of the writing to give his opinion outright.

[71] DW7's next basis for his conclusion is the long tapering end in the signature. This could probably be one of the many features; PW2 had identified a number of features as indicated in his report. To rely merely on one single feature is certainly unsafe to conclude common authorship.

[72] The other basis of DW7 is the speed of writing. He just used 'speed' to explain all the lesser features found in specimens and the many differences that PW2 had listed down. He further used the phraseology of 'dynamic of writing' to explain them and brushed away all the differences which he construed as natural variations and as inconsistent, insignificant and non-fundamental for purposes of comparison or examination. I find DW7's opinion in this respect too simplistic. In the first place, DW7 said he had considered all the differences as determined by PW2 but nowhere in his report, as he had admitted candidly, that he had indicated that he had done so. On the other hand, he attempted to say that there were no difference by merely giving a sweeping statement that those were natural variations but without rendering details or reasons. One would expect fundamentally from an expert is his observations, examination, findings and the reasons for his findings, inter alia. I cannot accept an assertion from an expert for something which he alleged that he had done but had nevertheless deliberately ignored in total to state so in his expert report. Indeed, he claimed in his evidence that it is a waste of time to list out all those differences as what PW2 did. I venture to say that he would perhaps found it equally a waste of time to consider them or deliberately elected to ignore them. I find it proper to draw a reasonable inference that he might not have directed his mind to those differences but only said he did to cover his own omission. The role of a document examiner as PW2 and DW7 has been well summarized by the learned author David Ellen in his book *The Scientific Examination of Documents* on the topic of 'examiner of questioned documents', as follows:

> The document examiner must be more than a technician; he must be a scientist, for the methods at his disposal are those of applied science. Each question with which he is confronted is an individual research problem, but, like all scientific investigations, each has as its ultimate goal the discovery of the facts. To reach this goal the examiner must be thorough, accurate, and entirely without bias. His task is not to prove by some devious means certain preconceived ideas of those who consult him, but to establish the facts that tell of the document's preparation and subsequent history through a study of its identifying details and the collation of its elements with those of known specimens.
>
> The document examiner's works does not end with the discovery of the identifying details in a document. He must properly interpret them and through logical reasoning arrive at a correct conclusion regarding the problem at hand. After arriving at an opinion, he must be prepared to demonstrate the basis and reasons for his opinion in a manner that a layman, be he judge, juror, or interested party, thoroughly understands.

[73] PW2 had examined all the features in the specimens, identified the common features found and compared them with the questioned signature. He identified the differences and explained them with his reasoning. I find him to have complied with the guided principle on his role as a document examiner. For a signature which could probably be construed easier to copy by a forger. I am of the view that every single detail whether similarity, difference or defect should be considered as important by an expert and should not be brushed aside by merely using the phrase that the differences are 'natural variations' or are 'inconsistent, insignificant and non-fundamental' without giving an account as to how and why they are so formed as well as the reasons thereof. To camouflage the deficiencies by using these jargons without anything to substantiate is most unsatisfactory and cannot be said that such opinion or finding is well founded. Whatever holistic view should also be accounted for with reasons as holistic view can be subjective and may not be empirical unless it is well grounded. As the learned author Ordway Hilton in the *Journal of Forensic Sciences,* JFSCA, Vol 28 No 3, July 1983 p 684, said unequivocally that 'Differences cannot be ignored. Differences in two writings distinguish between the work of two writers. But certain apparent differences may a have a logical explanation. Disguise, illness, intoxication and lack of care in one writing but not in the other are common ones. They do not necessarily negate an identification'. There is absolutely no evidence from DW7 to explain logically the differences that he construed as natural variations. In any event there is nothing that he had mentioned of these differences in his report. On a finding of fact, I do not find DW7's evidence in this aspect to be empirical and well founded.

[74] Reverting to the speed in writing, plaintiff submitted a paper titled '*Protecting Signatures Against Forgery*' presented by SK Gupta of Central Forensic Science Laboratory, Central Bureau of Investigation, New Delhi, India at the 8th Meeting of the International Association of Forensic Sciences, Wichita, Kansas, USA in May 1978 wherein a short passage of it is relevant herein:

> If he (the forger) is able to imitate successfully the form of the letters, he will not be able to write it with speed. If he wants to imitate the signature with speed he will not be able to copy the form successfully. Thus we find that if a signature is written with speed, then that signature possesses an element which will possibly protect it against forgery.

[75] In other words, if the signature is written with speed, a forgery might not be able to copy the form successful as he cannot do both. This is admitted by DW7. Hence, speed alone does not suffice to conclude the common authorship of a signature; it must also be coupled with the form. Even if the questioned signature was written with speed, an examiner is not relieved of his duty to look into its form to determine the differences or defects. Hence, this

court is of the view that any differences cannot be ignored by an expert document examiner. I do not find the opinion of DW7 to be convincing when he failed to consider the speed together with the form by analysing all the differences and/or similarities in order to come to an accurate opinion.

[76] This court would expect every expert to be vigilant and would examine every nooks and lines of a questioned signature comparing it with all relevant genuine specimens on the similarities as well as differences or dissimilarities, and evaluate them before achieving a conclusion. It should be borne in mind that an expert whose tendency is to conclude a finding in favour of the party requesting for his report and opinion, should nevertheless not compromise his role as an expert and should be honest in his fundamental duty which is to assist to ascertain the truth and perhaps to expose the forgery. He must act professionally pursuant to his expertise. An opinion based on distorted view will find no sanctuary in a court of law.

[77] Having considered the evidence of both PW2 and DW7 including their respective reports and considering their opinions and findings in the light of the facts and evidence of the whole case, this court does not prefer the opinion of DW7 as this court is not satisfied that his opinion is well founded for reasons above or supported with sufficient evidence (see *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 SC), but prefers the evidence of PW2 who had conducted a detailed and comprehensive analysis which is well-grounded and for the reasons advanced above. Consequently, on a balance of probabilities, this court accepts that the questioned signature of the deceased in the second will to be most probably not of the same authorship of the deceased but that it is most probably a forgery.

OTHER SUSPICIOUS CIRCUMSTANCES

[78] In *Tho Yew Pew & Anor v Chua Kooi Hean* [2002] 4 CLJ 90, the Court of Appeal has held, inter alia, that:

> [1] 'Suspicious circumstances', in the context of wills, refer to the circumstances surrounding the making of a will and not the circumstances pertaining to the testamentary capacity of the testator.

[79] This court has deliberated on the salient suspicious circumstances surrounding the making of the will earlier. An important fact which is not disputed by the parties is that the lawyer Chew Sien Chee and the witness to the second will, Koh Seong Hai (DW2), had never diverged information of the existence of the second will even after the death of the deceased. The intent and purpose of making a will is to have it put into effect after the death of the testator. Even if presumably accepting the word of DW2 that the deceased

allegedly told them not to tell anyone, it is unbelievable that Chew Sien Chee, the lawyer who purportedly attested the second will and knew the death of the deceased having attended the deceased's funeral would remain mute throughout about the existence of this second will and did not even inform Caroline Heah, PW3 of it when he wrote to PW3 about the representation of DW3, Chung Keng Chiew, who complained that he (DW3) had not instructed PW3 to represent him in respect of the first will. Chew Sien Chee acting as solicitors for the other siblings of the plaintiff could have easily notified PW3 the existence of the second will which was later in time where DW3 and the plaintiff were not the executors, and put an end to the matter of the first will. This unexplained facts leads to an irresistant doubt as to the existence of the second will well after the first will had been disclosed to all siblings.

[80] On the suspicious circumstances raised by the plaintiff basing on the relationship between the deceased and DW1, DW5 and others, I find no necessity to add salt to the wounds to the existing sour relationship among the siblings.

CONCLUSION

[81] Having considered all the evidence and submission by both parties and for the foregoing reasons upon a finding of facts, I hold that the first will is the valid and effective last will and testament of the deceased and that the plaintiff has proved his case on a balance of probabilities. I also hold upon a positive finding of facts that the defendants have failed to prove the second will to be the last will and testament of the deceased on a balance of probabilities. Consequently, I allow the plaintiff's claim as prayed for in para 26(a) of his amended statement of claim. I order that the Petition for Probate No 32–32 of 2000 in respect of the second will be forthwith struck out. Cost of RM35,000 is awarded to the plaintiff.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum